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Memorandum Opinion

Date: Monday, December 15, 2003

To: United States Department of State,
CA/OCS/PRI,
Adoption Regulations Docket Room,
2201 C Street, NW, Washington, DC 20520

cc: See Distribution List

From: Carl A. Jenkins

Ref: Docket No. State/AR-01/96

The following comments are respectfully offered in an effort to improve the system that the proposed regulations are designed to enhance. However, Jenkins & Povtak believes that, as proposed, certain provisions of the regulations run afoul of Constitutional conflicts, and in particular the 10th and 14th Amendments, (among other concerns), and therefore need reconsideration. We are particularly concerned with provisions concerning liability, whose effects run counter to the goals of the Convention and the IAA by increasing the risks and costs of operation of adoption agencies to the point that smaller agencies may not be able to participate in international adoptions.

We would recommend that the Department of State issue an interim ruling on the Regulations, with a period for further public comment; thereby allowing additional data to be presented and incorporated into the regulations through the thorough process of public comment and discussion among all those involved so that the issues noted below may be satisfactorily resolved. This would allow a greater opportunity for open debate and input from legislative and State regulatory sources – we would rather postpone the finalization in order to ensure that the regulations are truly comprehensive.

Additionally, absent such qualifying language in the below Comments, Jenkins & Povtak endorses and incorporates by reference those concepts, concerns, suggestions and observations noted (generally) in those companion comments issued by: the Joint Council on International Children's Services; the New Mexico Department of Children, Youth & Families; the Maryland Department of Social Services; Focus on Adoption and Reaching Out thru International Adoption (New Jersey).

For discussion purposes, we believe there exists four major areas of concern:

1. Jurisdictional Conflicts
   - 10th Amendment (State vs. National)
   - Licensed vs. Accredited (State vs. National)
2. Liability Concerns
   - Common Law vs. Strict/Statutory Liability
   - Insurance Limitations
3. Dispute Resolution Issues
   - 10th Amendment (State vs. National)

- Arbitration as alternative

4. Standards Conflicts
   - Choice of Law Questions
   - Status in Federal venues

Therefore, the following comments are organized less in regulatory order, *seriatim*, but rather according to the intellectual precepts presented by the specific regulation.

Jurisdictional Conflicts

Preliminarily, it should be noted that anytime regulatory provisions 'overreach' the statutory authority authorizing such regulations, the regulations, *per se*, become, *ipso facto*, invalid. *See, e.g.*, § 96.39(d) – "blanket waivers"; §§ 96.45(c) & 96.46(c) – "strict liability"; and § 96.76, *et. seq.* – "adverse action(s)."

It does not appear to be within the authority of the Secretary of State, under its regulatory authority pursuant to the IAA, to establish rules of civil liability in tort or contract, which rules would purport to replace existing statutory and case law in this complex area of law. This is an area reserved to the legislature and to the courts under the United States Constitution, and which the IAA does not expressly delegate to the Department of State.[1] Nor does Subpart K stipulate a fundamental due process procedure for agencies regarding "adverse actions", which would include notice and opportunity to defend, including, *inter alia*: details of claims; standards of proof; hearings and/or an administrative review process.

Furthermore, under the 10th Amendment, the Constitution must necessarily draw a distinction between the concepts of "licensing" an organization for the placement of children (adoption) and Congress' passage of the Intercountry Adoption Act (IAA), which "accredits" an organization to permit foreign placements. *See, e.g.* § 96.37 – "qualifications"; § 96.33 – "mandatory insurance".

Where individual State licensing entities have regulatory authority under the Constitution to determine the appropriate qualifications for adoption service providers' employees, and individual States have enacted statutory "charitable immunity" laws regulating insurance and/or liability exposure of eleemosynary institutions, a contradictory requirement under these proposed regulations seems destined for Constitutional challenge even prior to implementation.

The current standard in most States is to have a Master's Degree supervisor review and approve a Bachelor's Degree personnel home study; however, the Proposed Regulations set a higher standard than the licensing States. The strict requirement of one particular degree limits the ability of an accredited agency to select home study personnel based on experience, personal sensitivity, moral character and the many other traits necessary to perform their job functions successfully.

As example: South Carolina does not automatically grant a person that has a Masters of Social Work degree a license to conduct homestudies. They are subject to the same training and supervisory requirements as a person that does not have a Master of Social Work degree. This includes a two-year supervisory period where the individual must be under the supervision of a Certified Investigator licensed by the state of South Carolina.

In that vein, we would advocate for assimilating, *wherever possible*, the existing State *licensing* regulations, which standards agencies and individuals would have met prior to seeking *accreditation*, and focus on those areas specifically necessary for Hague compliance, in order to avoid jurisdictional conflicts.

Similarly, many States have existing licensing requirements concerning insurance coverage regarding the licensing of adoption agencies, as well as "charitable immunity" statutes, which limit the extent of recovery against eleemosynary institutions. [2] To override existing State licensing statutes regarding insurance

[1] *See, e.g. Chambers v. St. Mary's School*, 82 Ohio St. 3d 563, 697 N.E.2d 198 (S. Ct. Ohio 1998).
[2] See, http://www.nonprofitrisk.org/pubs/sll.htm (Nonprofit Risk Management Center, 1130 Seventeenth Street, NW, Suite 210, Washington, DC 20036) for a complete downloadable listing of statutory provisions, by State, as well as other 501(c)(3) issues and publications.

coverage provisions and/or enacted statutory limits to financial exposure would seem to [unnecessarily] interpose administrative fiat over considered, legislative intent.

Liability Concerns

There presently exists a body of both statutory and common law surrounding the concept of "wrongful adoption" at both the State and Federal level.[3] *See*, Howard M. Cooper, "Enforcement of Contractual Release and Hold Harmless Langue In 'Wrongful Adoption Cases," Boston Bar Journal, May/June 2000 (*citing Forbes v. The Alliance for Children, Inc., et al*, Suffolk County, Civil Action No. 97-04869B; *Regensburger v. China Adoption Consultant ltd.*, 138 F.3d 1201 (7th Cir. 1999); *Ferenc v. World Child, Inc.*, 977 F. Supp. 56 (D.D.C. 1997), aff'd, No. 97-7167 (D. D.C. Cir. Sept. 10, 1998)).

The Proposed Regulations regarding "strict liability" under §§ 96.45 & 96.46 alter basic principles of tort law – by removing the need for adoptive parents to demonstrate any fault whatsoever on the part of their accredited agency in order to collect a judgment – the proposed scheme would bestow upon parents a greater legal guarantee than they would have if their adopted child had been conceived biologically. The IAA does not establish or authorize specific standards for provider liability under contract, tort or civil law. Civil liability for the acts of agents is a matter that has developed in the courts, and to some extent through legislation, over a very long period. There is a major difference between requiring primary providers in the U.S. to exercise due diligence and do everything they can to obtain complete and accurate information and secure compliance with Hague requirements in intercountry adoptions, and making such U.S. agencies strictly liable for damages resulting from matters over which they have no possible control. Imposition of a statutory prohibition such as that proposed in this regulation is inappropriate interference with a well-justified business practice, contractual "Assumption of Risk". This is a recognized principle and numerous courts have determined that exculpatory contract provisions in this precise context are appropriate and consistent with public policy.

Additionally, the arbitrary requirement of mandatory insurance coverage is grounded neither in public policy nor in existing, real world actuality. As noted, *supra.*, many States already require insurance and/or have statutory "charitable immunity" laws, which pertain directly to *licensed* adoption agencies. By superseding these State statutes, the Central Authority places itself through the 14th Amendment in the position of obligating itself to providing such insurance in the event none can be obtained. Many agencies are reporting severe difficulties in obtaining insurance, and insurance sources are advising them that they will not provide insurance coverage for these added assumptions of strict liability; therefore making this provision both unreasonable and impracticable.[4] Should the Central Authority proceed, then it would be obligated to provide such insurance policies to agencies, similar to the requirement of the States to offer motor vehicle insurance to *license* holders as a prerequisite to mandatory driving insurance.

One additional suggestion in this regard has been to offer such insurance both to agencies, and to individual adoptive parents, thereby spreading any "assumption of risk" equally among all parties to the adoption process.

Dispute Resolution

It should be noted that various States additionally have mandated legal forums for adjudication of disputes, usually through the State's Administrative Law courts. Inasmuch as these specifically apply to *licensed* adoption agencies, the Proposed Regulations regarding *accredited* agencies seems statutorily to preempt the 10th Amendment, which clearly reserves child-placement activities to the individual States.

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[3] For an exhaustive discussion of the legal concept, generally, *See*, Harriet Dinegar Milks, J.D., *"Wrongful Adoption" causes of action against adoption agencies where children have or develop mental or physical problems that are misrepresented or not disclosed to adoption parents*, 74 A.L.R.5th 1 (1999). (Attached hereto as *Exhibit "1"*).

4 *See*, Memorandum Letter from Great Oak Insurance, Inc., detailing (1) the dwindling number of adoption agency liability underwriters, and (2) the skyrocketing cost of those few policies still available. (Attached hereto as *Exhibit "2"*).

Notwithstanding the statutory provisions contained in the Proposed Regulations regarding any imposition of strict liability and/or adverse actions which are subject to judicial review in a Federal court, the Supreme Court has upheld in numerous instances that Arbitration Clauses, (contractually agreed to by a variety of parties) are binding, and the IAA requires *accredited* agencies to enter into contracts with individual applicants.[5] Ergo, a private, *accredited* adoption agency, properly incorporated and *licensed* in a State with a statutory, charitable immunity clause, may contractually bind "applicant parties" to arbitration, removing itself from federal court and availing itself of statutory immunity, notwithstanding any purported "strict liability" threshold within the IAA itself.

Standards Conflicts

In determining the appropriate standards for review to apply in an international adoption, Jenkins & Povtak would advocate, at all reasonable occasions, that appropriate State standards be applied whenever conflicting, in light of the overwhelming public interest and the best interest of the child, as codified by State statutes under the 10th Amendment, and that only where international, or for uniformity of application, interests supersede States' rights should the IAA, [as amended], be the central focus of statutory oversight, and in particular, Subpart F.

Furthermore, Subparts I, J & K regarding oversight and "adverse action" are fraught with a lack of Constitutional safeguards for vagueness [*substantial compliance?*]; procedural uncertainty; and procedural due process.[6] As an aside, we would note the potential of these Proposed Regulations to conflict with other, existing statutory limits [yet unknown].

As Example: Notwithstanding the statutory provisions contained in the IAA, the passage by Congress of the "American Competitiveness and Corporate Accountability Act of 2002" (*Sarbanes-Oxley Act*) incorporates a number of provisions, including criminal provisions, (18 USC § 1519), which apply to for-profit and non-profit organizations alike, and tracks the language of the federal false statements statute, (18 USC §1001).[7]

Because the statute applies to "*...any matter within the jurisdiction of any department or agency of the United States.. or in relation to or contemplation of any such matter or case...*" arguably an accrediting/approving entity "*will be considered an agency as defined in 5 USC §701 for purpose of judicial review...*" and therefore, designated accrediting/approving entities under the IAA are endowed with federal police powers.

Conclusion

In its role as the "Central Authority", the U.S. Department of State must necessarily provide the guiding direction for future, Hague Convention, international adoptions. The Central Authority can alleviate many obstacles by supporting the various parties to the adoption process: creating an accessible resource library of translated foreign adoption laws; providing "standardized" (on-line) educational, parent training courses; certifying the reliability/accuracy of medical and social information provided by other Hague "Central Authority" sending countries; providing adoption insurance for both agencies and adopting parents; developing a uniform database for statistical analysis of international adoption issues, and providing for a supportive and unbiased system of certification [accreditation] of child-placement entities.

These comments are provided in the hope that continued, frank and open discussion of the obstacles involved will lead to a larger, diversified and eager pool of both adoptive parents and children who otherwise would not have the opportunity to live as "family".

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Attachments
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[5] 22 CFR § 96.39: Information disclosure and fees charged (*as proposed*).
[6] Jenkins & Povtak specifically references the Comments provided by JCICS in this regard, and adopts them herein as if fully stated.
[7] Hamel, W. Warren, Esquire, "A Guide for Nonprofits to the Sarbanes-Oxley Act", The WCA Nonprofit Agenda, Sept./Oct. 2003, (*originally published as* "What Corporate Governance Legislation Means to You", Association Management, March 2003). [Mr. Hamel is an attorney with Venable, LLP]

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American Law Reports
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Annotation

"WRONGFUL ADOPTION" CAUSES OF ACTION AGAINST ADOPTION AGENCIES WHERE CHILDREN HAVE OR DEVELOP MENTAL OR PHYSICAL PROBLEMS THAT ARE MISREPRESENTED OR NOT DISCLOSED TO ADOPTIVE PARENTS

Harriet Dinegar Milks, J.D.

In a growing number of cases, adoptive parents are attempting to recover damages from adoption agencies, as opposed to nullifying or vacating the adoption, for the agencies' misrepresentations regarding the health or familial background of the adopted child or for the agencies' failure to disclose information that was in their possession prior to the adoption. Courts have generally begun recognizing these "wrongful adoption" actions, though not uniformly. For example, in Mohr v. Com., 421 Mass. 147, 653 N.E.2d 1104, 74 A.L.R.5th 693 (1995), the court recognized the common-law tort of negligent misrepresentation in the adoption context, though other courts have not, noting that while an agency cannot be expected to guarantee or warranty a child's future health, the agency must use due care to ensure that it fully and adequately discloses information about a child's background so as not to mislead potential adoptive parents. This annotation collects the cases addressing whether courts have recognized the various "wrongful adoption" causes of action and whether adoptive parents could recover for particular misrepresentations or failures to disclose information regarding an adoptee's health or family history.

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ARTICLE

1. PRELIMINARY MATTERS

§ 1. Introduction

[a] Scope

This annotation [FN1] collects and discusses the state and federal cases in which the courts have considered the application of various "wrongful adoption" causes of action, sounding in tort or contract, by adoptive parents against the adoption agencies [FN2] involved in the adoption, where the agency misrepresented or failed to disclose the health or background of an adopted child to the adoptive parents. [FN3]

A number of jurisdictions may have rules, regulations, constitutional provisions, or legislative enactments directly bearing upon this subject. These provisions are discussed herein only to the extent and in the form that they are reflected in the court opinions that fall within the scope of this annotation. The reader is consequently advised to consult the appropriate statutory or regulatory compilations to ascertain the current status of all statutes discussed herein, including those listed in the Jurisdictional Table of Cited Statutes and Cases. In addition, some opinions discussed in this annotation may be restricted by court rule as to publication and citation in briefs; readers are cautioned to check each case for restrictions.

[b] Related annotations

Attorney malpractice in connection with services related to adoption of child. 18 ALR5th 892.

Liability of public or private agency or its employees to prospective adoptive parents in contract or tort for failure to complete arrangement for adoption. 8 ALR5th 860.

Liability of legal or natural parent, or one who aids and abets, for damages resulting from abduction of own child. 49 ALR4th 7.

Required parties in adoption proceedings. 48 ALR4th 860.

Marital or sexual relationship between parties as affecting right to adopt. 42 ALR4th 776.

Race as factor in adoption proceedings. 34 ALR4th 167.

Criminal liability of one arranging for adoption of child through other than licensed child placement agency ("baby broker acts"). 3 ALR4th 468.

Marital status of prospective adopting parents as factor in adoption proceedings. 2 ALR4th 555.

Modern status of law as to equitable adoption or adoption by estoppel. 97 ALR3d 347.

Age of prospective adoptive parent as factor in adoption proceedings. 84 ALR3d 665.

Parent's involuntary confinement, or failure to care for child as result thereof, as permitting adoption without parental consent. 78 ALR3d 712.

Mistake or want of understanding as ground for revocation of consent to adoption or of agreement releasing infant to adoption placement agency. 74 ALR3d 489.

Religion as factor in adoption proceedings. 48 ALR3d 383.

Mental illness and the like of parents as ground for adoption of their children. 45 ALR2d 1379.

Failure of state or local government entity to protect a child abuse victim as violation of federal constitutional right. 79 ALR Fed 514.

§ 2. Summary and comment

[a] Generally

Although a challenge to a final adoption decree is most frequently brought by a biological parent, [FN4] usually on the basis of lack of consent to the adoption, [FN5] adopting parents may seek relief where an adoption has already taken place. Occasionally, the requested relief is simply an annulment of the decree. In some jurisdictions, statutes set forth specific grounds upon which an adoption decree may be set aside, including health reasons, racial differences, misconduct, fraud, and the welfare of the child. [FN6] More often, the relief sought is in the form of damages.

"Wrongful adoption" is the shorthand term often applied to the group of tort actions brought by adoptive parents

against adoption agencies, seeking damages arising from adoptions. Typically, such actions allege negligence or misrepresentation regarding the child's medical condition, reliance thereon by the adoptive parents, and damages in the form of the cost of medical or psychiatric care. The application of tort theories in claims against adoption agencies was hardly known before 1986. Burr v. Board of County Com'rs of Stark County, 23 Ohio St. 3d 69, 491 N.E.2d 1101, 56 A.L.R.4th 357 (1986), was the first case to define the elements of "wrongful adoption." In that case, the cause of action was grounded in the elements of fraud. Prior to Burr, agencies had successfully argued (and some continue to argue) that they should be immune from such suits on public policy grounds. This position enjoyed some early success because, historically, the public has not generally been well informed about the role and responsibilities of adoption agencies. A number of tragic cases, and the media attention and public awareness that followed them, have made potential litigants more aware of the responsibilities of adoption agencies and, consequently, the existence of various causes of action. The increase in the number of wrongful adoption suits may also be attributed to the increase in the number of foreign adoptions, where access to medical records of the children may be limited by cultural, governmental, or language requirements.

The causes of action which typically underlie a claim for wrongful adoption are often based on long established common-law tort principles. Liability may also be premised on statutory grounds, as many states have enacted statutes or administrative or licensing codes that require adoption agencies to adhere to a certain standard or to conduct a good-faith investigation into the child's background and to provide prospective adoptive parents with all information in the agency's possession. However, different causes of action have had varying degrees of success in being recognized in the adoption setting. Thus, negligent misrepresentation has been recognized as a viable cause of action in some cases (§ 3[b]), while in others courts have declined to recognize the tort in the adoption context (§ 3[b]). Similarly, intentional misrepresentation has been recognized by the majority of courts addressing the issue (§ 4[a]), though the court in one case declined to apply such cause of action (§ 4[b]).

Courts have varied in their opinions on the duty owed to adoptive parents to disclose relevant information, with some courts recognizing a cause of action for failure to disclose (§ 5[a]) and some courts declining to do so (§ 5[b]). However, courts have agreed that failure to investigate is not a viable cause of action, absent some statutorily imposed duty (§ 6). Emotional distress (§ 7), breach of contract (§ 8[b]), and constitutional claims (§ 9) have also been asserted without much success, though one court did conclude that a breach of contract cause of action was viable (§ 8[a]).

Where the courts did recognize the asserted cause of action, recovery varied based on the facts of the particular case. Therefore, where an agency allegedly assured or misstated the health of the adoptee, courts have allowed recovery or remanded the cause for further determination in some cases (§ 10[a]), while denying recovery in others (§ 10[b]). Courts in several instances have also allowed recovery or remanded for further proceedings where an agency allegedly misstated the child's familial background (§ 11) or withheld information regarding the health of the child (§ 12) or the child's familial background (§ 13).

[b] Practice pointers

The practitioner contemplating bringing an action against an adoption agency should investigate all regulations pertaining to the work of the child-placing agency, including licensing and operating manuals and state statutes, and the decisional law on the separate causes of action.

Agencies and intermediaries who work with foreign adoptions may attempt to limit their exposure to liability for negligent misrepresentation or failure to disclose by including waivers and release provisions in their contracts with prospective adoptive parents. Courts have found such exculpatory clauses to be enforceable. [FN7]

Counsel for both sides should be aware of potential statute of limitation issues regarding when the injury occurred [FN8] and immunity issues surrounding acts of public agencies. [FN9]

II. RECOGNITION OF "WRONGFUL ADOPTION" CAUSES OF ACTION

§ 3. Negligent misrepresentation

[a] View that cause of action may lie

The courts in the following cases have recognized claims for negligent misrepresentation in the adoption context.

The court in Ferenc v. World Child, Inc., 977 F. Supp. 56 (D.D.C. 1997), aff'd without published opinion, 172 F.3d 919 (D.C. Cir. 1998) (applying District of Columbia law), anticipated the District's recognition of a tort of "wrongful adoption" for negligent misrepresentations made in the adoption context. The plaintiffs had adopted a child from Russia, following numerous assurances which were made by the United States agency that arranged the adoption and the pediatrician at the orphanage that the child was generally healthy and that he had only minor and correctable problems. The court analogized to the tort of wrongful birth, which had been recognized, and precedent from other jurisdictions, in anticipating recognition under District of Columbia law.

In Roe v. Catholic Charities of the Diocese of Springfield, Ill., 225 Ill. App. 3d 519, 167 Ill. Dec. 713, 588 N.E.2d 354 (5th Dist. 1992), the court held that adoptive parents could maintain an action for adoption agency negligence for failing to disclose necessary medical and psychological information to adoptive parents. Though the agency argued that Illinois did not recognize such a cause of action, the court disagreed, recognizing that one can allege a cause of action grounded in negligence against an adoption agency. In this case, the agency did not disclose to the adoptive parents the medical backgrounds of the children, even though the children had serious behavioral problems. One of the children stomped the family dog to death. The parents sued the agency, alleging fraud, breach of contract, and negligence. The court stated that since the adoption agency is the only one of the parties with the information concerning the infants' physical and psychological health, the burden of disclosure can be placed on no other party. The court noted that the consequence of placing that burden on the agency is that the agency discloses what information it has in response to an adopting parent's inquiry, so that adoptive parents assume the awesome responsibility of raising a child with their eyes wide open. The court further noted that the consequences of placing the burden of disclosure upon the agency included a party's being answerable for the consequences of their own acts or omissions. The court also rejected the agency's claim that subjecting it to liability for negligence would hinder its ability to place handicapped children for adoption.

In order to establish the causation element in a fraudulent misrepresentation or negligent misrepresentation cause of action against an adoption agency for placement of a child, an adoptive parent must establish that he asked a question that a rational parent would consider relevant to gauging the future risks of serious mental or physical illness, and that but for the adoption agency's false statement regarding that risk they would not have adopted the child. Roe v. Jewish Children's Bureau of Chicago, 274 Ill. Dec. 109, 790 N.E.2d 882 (App. Ct. 1st Dist. 2003).

There can be liability for wrongful adoption claims based on negligent misrepresentations about the child's prior history, held the court in Mohr v. Com., 421 Mass. 147, 653 N.E.2d 1104, 74 A.L.R.5th 693 (1995). In this case, the parents adopted a six-year-old from a state adoption agency. They were told that there were no medical records available, that the child was small for her age, and that her biological mother placed her for adoption because she was young and wanted to go into nursing. The agency knew but failed to disclose that the birth mother was in fact confined to a mental institution, had chronic schizophrenia, and had a low IQ. The agency also knew but did not disclose that the child had been given an early developmental examination that showed her to be developmentally delayed. Citing Mass. Regs. Code tit. 110 § 7.213(3), and the common-law notion of good-faith and fair dealing, the court found that an adoption agency has an affirmative duty to disclose information that would enable the adopting parents to make a knowledgeable decision. In support of its conclusion, the court noted that full disclosure is necessary in the adoption setting; that applying accepted tort principles would prevent adoption agencies from being exempt from tort liability for false statements negligently made during the adoption process; that allowing liability for negligent and intentional "wrongful adoption" does not impose any "extraordinary or onerous" burden on adoption agencies; and that a negligent "wrongful adoption" cause of action does not conflict with the biological

parents' interest in keeping their identities confidential. Additionally, noting that state agencies are immune from prosecution under the state tort claims law, Mass. Gen. Laws ch. 258 § 10(c), the court observed that absent the ability to make a claim for negligence, adoptive parents would have no recourse, and stated that it could not sanction such a result. The court further held that state adoption agencies are not immune under Mass. Gen. Laws ch. 258 § 10(b), which provides immunity under the discretionary function exception to governmental tort liability.

Public policy did not preclude an action for negligent misrepresentation against an adoption agency, where the agency undertook to disclose information concerning the adoptive child's biological parents and medical background to the adoptive parents, but withheld information in such a way as to mislead the adoptive parents, the court held in M.H. v. Caritas Family Services, 488 N.W.2d 282 (Minn. 1992), appeal after remand, 1995 WL 46304 (Minn. Ct. App. 1995). In this case, the agency disclosed that there was a possibility of incest and a "slight" chance of abnormalities related thereto, but failed to disclose facts including that the genetic father was the 17-year-old brother of the 13-year-old mother, and that the father was considered "borderline hyperactive," tested low-average in intelligence, and was discharged from therapy at local mental health center for failure to cooperate with the therapist. The agency later admitted that it knew of the fact that the biological parents were siblings, and that it withheld that information from the prospective adoptive parents. The agency asked the court to hold as a matter of law that recognition of a legal duty of care with respect to negligent representations of adoption agencies would not be consistent with good public policy because recognizing such a duty would place an unreasonable burden on adoption agencies to verify family histories given to them by biological parents, and because disclosure of unappealing information would discourage adoptions and stigmatize adopted children. The court rejected all of these arguments, holding that recognition of a legal duty to disclose facts when disclosure is necessary to prevent a misunderstanding or to clarify information already disclosed which would otherwise be misleading does not impose an extraordinary or onerous burden on agencies. Where an agency assumes a duty to disclose, concluded the court, it must refrain from making affirmative misrepresentations and from conveying information in such a way as to mislead.

In Jackson v. State, 1998 MT 46, 287 Mont. 473, 956 P.2d 35 (1998), the court held that adoptive parents could bring a cause of action for negligent misrepresentation in the adoption context. The adoptive parents alleged that the state agency withheld details of the child's background, even though it had extensive medical and social evaluations in their possession during conferences with the prospective adoptive parents. The state was aware before the adoption that the child's biological mother suffered from an organic or psychiatric impairment, and that both of the child's putative fathers were diagnosed with paranoid disorders. The agency told the prospective adoptive parents simply that the biological parents were not capable of or interested in caring for the child. The child was later diagnosed with pervasive developmental disorders, learning disorder, and hyperactivity disorder. The court denied the state's motion for summary judgment, holding that the adoptive parents could maintain a cause of action for negligent misrepresentation. The court stated that when the state began volunteering information about the biological parents, it assumed a duty to do so with care. The court therefore concluded that, in line with the recent majority of courts addressing this issue, recognizing a cause of action for negligent misrepresentation in the adoption context will, in fact, promote public policy and ensure that "adoptive parents assume the awesome responsibility of raising a child with their eyes wide open."

In Gibbs v. Ernst, 538 Pa. 193, 647 A.2d 882 (1994), the court recognized the common-law tort of negligent representation in the adoption context. The court cited 23 Pa. Cons. Stat. § 2909(a) and 23 Pa. Cons. Stat. § 2533(b)(12), which create an obligation on the part of an agency to make a good-faith effort to obtain medical histories, and to disclose them fully and accurately. The court also found that the duty to disclose arises from the relationship between the adoption agency and the prospective adopting parents, which the court described as unique because the parties act not as adversaries but in concert to achieve a result desired by both sides in the creation of a family unit. Recognizing that negligent misrepresentation requires that the adoption agency make reasonable efforts to determine whether its representations are true, the court stated that its belief that this admittedly heavier burden is tempered because agencies are only under the obligation to make reasonable efforts to determine if their statements are true and agencies may refrain from making any representations at all if they find that the burden of reasonable investigation is too harsh. The court noted that the tort is sufficiently restricted by the common-law notion of foreseeability as found in the concepts of duty and proximate cause to prevent an agency from becoming in any way a guarantee or warranty of a child's future health.

See Zernhelt v. Lehigh County Office of Children and Youth Services, 659 A.2d 89 (Pa. Commw. Ct. 1995), § 4[h], where the court held that on motion for summary judgment in a fraud and negligent infliction of emotional distress action by the adoptive parents against a county office of children and youth services arising out of the office's alleged failure to inform the adoptive parents about the mental illness of the biological parents of their adoptive child who exhibited behavioral problems after adoption and eventually set fire to the family home, the court did not err in granting motion on the pleadings against the adoptive parents, where, with regard to wrongful adoption actions, the applicable state statute, 42 Pa. Cons. Stat. § 8550, provides that liability can be imposed on local agency only for negligent acts, which are defined as excluding acts or conduct that constitutes crime, actual fraud, actual malice, or willful misconduct.

In Mallette v. Children's Friend and Service, 661 A.2d 67 (R.I. 1995), the tort of negligent misrepresentation was found to be applicable under Rhode Island law in the adoption context where all of the elements of that tort are met. As recited by the court, the elements are (1) a misrepresentation of material fact; (2) the representer's knowledge of the misrepresentation, having made the representation without knowledge of its truth or falsity, or having made it under circumstances in which he ought to have known of its falsity; (3) intention that another will act in reliance on the representation, and (4) injury resulting from justifiable reliance. The court noted that Rhode Island, along with Nevada and Alaska, has no statute requiring adoption agencies to disclose information to adoptive parents, and that Minnesota and Kansas require collection of health data but do not require it to be given to the adoptive parents. The court rejected the agency's contention that it had no duty to disclose since there was no statute requiring disclosure. The court recognized an extension of common-law liability and found a duty where the agency volunteers information about a child's health. When an agency takes the initiative to disseminate such information, the court ruled, it assumes a duty to refrain from making negligent misrepresentations.

In Wolford v. Children's Home Society of West Virginia, 17 F. Supp. 2d 577 (S.D. W. Va. 1998) (applying West Virginia law), the court denied a summary judgment motion brought by an adoption agency, holding that West Virginia law recognized claims for negligent misrepresentation in the adoption context. In this case, the prospective adoptive parents specifically asked the agency whether their child's remarkable facial features were due to fetal alcohol syndrome. The agency allegedly responded that the birth mother had not used alcohol and that the child's appearance was due to a "familial look." In fact, the child had been enrolled in an early treatment program for children with fetal alcohol syndrome, and the agency was apparently aware at the time of placement that the birth mother was an alcoholic. Noting the general trend towards recognition of common-law fraud and negligence claims against adoption agencies for "wrongful adoption," the court anticipated that West Virginia state courts would likewise recognize such claims, particularly in light of West Virginia's disclosure statute, W. Va. Code § 48-4-6, and the statute authorizing private causes of action for statutory violations, W. Va. Code § 55-7-9.

In Meracle v. Children's Service Soc. of Wisconsin, 149 Wis. 2d 19, 437 N.W.2d 532 (1989), the court held that adoptive parents' wrongful adoption negligence claim was not barred by public policy. The child contracted Huntington's Disease after the adoption agency negligently misled adoptive parents to believe that the child was not at risk. The agency had told the parents that the child's biological grandmother had died of the disease, but that since a test for the disease on the child's father had been negative, the child would not be at risk. In fact, no such test existed. The child's father could not have been and was not, tested. The court found that the agency assumed a duty to avoid misrepresenting the child's risk of contracting the disease when it voluntarily undertook to furnish the information and prognosis. If the agency chooses to disclose information, stated the court, it must not do so negligently. Such a conclusion does not expose adoption agencies to potentially unlimited liability nor does it make such agencies guarantors of the health of adopted children, noted the court. To avoid liability, the court concluded, agencies simply must refrain from making affirmative misrepresentations about a child's health.

In Nierengarten v. Lutheran Social Services of Wisconsin, 209 Wis.2d 538, 563 N.W.2d 181 (Ct. App. 1997), review granted, 212 Wis.2d 687, 569 N.W.2d 589 (1997) and rev'd on statute of limitations grounds, 219 Wis.2d 686, 580 N.W.2d 320 (1998), reconsideration denied, 220 Wis.2d 369, 585 N.W.2d 160 (1998), the court recognized that Wisconsin courts recognized a cause of action based upon an affirmative misrepresentation of a child's health. The court reversed summary judgment in favor of the defendant agency on the plaintiff's claim for negligent misrepresentation where the agency affirmatively represented that the child was healthy, even tempered, slept from 8 p.m. to 7 a.m., and was toilet trained, when in fact the child had attention deficit disorder and bipolar disorder, slept only five hours per night, was not toilet trained, and was given to biting and extreme temper tantrums which

would last for hours, and where the agency continued to reassure the adoptive parents that the child was exhibiting normal adjustment behavior, even after the specific manifestations of his problems became known.

[b] View that cause of action may not lie

The courts in the following cases declined to recognize claims for negligent misrepresentation in the adoption context.

In Richard P. v. Vista Del Mar Child Care Service, 106 Cal. App. 3d 860, 165 Cal. Rptr. 370 (2d Dist. 1980), on grounds of public policy, the court rejected a contention that an adoption agency may be held liable in tort on a theory of negligent misrepresentation in failing to warn the adoptive parents that the infant's premature birth might in the future lead to health problems, either physical or mental. The court explained that policy factors that must be considered in determining whether a duty of care exists are the foreseeability of harm, the degree of certainty of injury, the closeness of the connection between the agency's conduct, the policy of preventing future harm, the extent of the burden to the agency and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved. Considering these factors, the court said that it does not follow that a premature baby will necessarily suffer severe emotional or developmental problems at some future date, since such injuries are necessarily the result of a variety of causative factors other than the child's premature birth. No moral blame could be attributed to an adoption agency which makes a full disclosure of the child's medical history to the prospective adoptive parents, the court observed. Moreover, it said that it is doubtful that the proposed liability would reduce future harm, but that to the contrary, it would be more likely to impede the proper functioning of adoption agencies. To impose liability in such a situation would be in effect making the adoption agency a guarantor of the infant's future good health, the court concluded, which it said would be entirely unreasonable, since such a guarantee is unavailable to natural parents of a healthy child who have no assurance that their child will continue to enjoy good physical and emotional health.

The court in Michael J. v. Los Angeles County Dept. of Adoptions, 201 Cal. App. 3d 859, 247 Cal. Rptr. 504 (2d Dist. 1988), found that while the state tort claims act, Cal. Gov't. Code § § 818.8 and 822.2, does not immunize a county adoption agency from liability for negligent or intentional misrepresentations or concealment in regard to the health of a prospective adoptee, a claim for mere negligence could not stand. An adoptive parent and her adopted son sued a county department of adoptions for negligence and fraud, alleging that the agency had failed to determine the medical condition of the child and made misrepresentations of complete health, when the child was suffering from a congenital degenerative nerve disorder. Some 10 years after his adoption, the child had seizures and was diagnosed as suffering from Sturge-Weber Syndrome, a congenital degenerative nerve disorder. Since birth, the child had a port wine stain on his upper torso and face. The agency had known, but did not disclose, stated the court, that the child's examining physician had refused to make a prognosis on the child's health when he was an infant, suggesting fraudulent nondisclosure, and the court held that there were also triable issues of fact concerning the port wine stain on the child's head and upper torso (allegedly an indication of the disease), and the agency's representation that it was merely a birthmark. While deliberate concealment or misrepresentation would be actionable, the court held, an adoption agency cannot be made the guarantor of an infant's future good health and should not be liable for mere negligence in providing information about the health of a prospective adoptee.

An action by the father of an adopted child could not, as a matter of law, be maintained against an adoption agency for mental retardation caused by a physicians' failure to test the child for phenylketonuria prior to adoption, held the court in Foster by Foster v. Bass, 575 So. 2d 967 (Miss. 1990). The court noted that even if the agency was negligent in completing the child's medical information form such that it was not disclosed that the child was not so tested, as the agency had no duty to conduct the test and could not reasonably foresee injury or that physicians would be negligent in performing their duties.

§ 4. Intentional misrepresentation

[a] View that cause of action may lie

The courts in the following cases recognized a cause of action for wrongful adoption based on intentional misrepresentation in the adoption context.

Where a county adoption agency made representations to an adoptive parent that a large "port wine" stain on the adopted child was merely a birthmark and failed to disclose that the examining physician would not render a prognosis for the child, and evidence tended to show that the agency and physician knew or should have known that the stain was a manifestation of a serious neurological disorder, triable issues of fact existed as to fraudulent nondisclosure on the part of the agency, and fraudulent misrepresentation of the implications regarding the stain, which covered a large portion of the child's face, neck, chest, and back, the court held in Michael J. v. Los Angeles County Dept. of Adoptions, 201 Cal. App. 3d 859, 247 Cal. Rptr. 504 (2d Dist. 1988). Therefore, the court denied the agency's motion for summary judgment on the plaintiff's claim alleging intentional misrepresentation and fraudulent concealment. The court also found that the state tort claims act, Cal. Gov't. Code § § 818.8 and 822.2, does not immunize a county agency from liability for negligent or intentional misrepresentations or concealment in regard to the health of a prospective adoptee. Characterizing adoption agencies as trustees of the child's destiny, the court observed that adoption agencies are obligated to act with morals greater than those found in "a purveyor's common marketplace." The court further observed that although an adoption agency is not a guarantor of the future health of prospective adoptees, and should not be held liable for mere negligence in providing information regarding the health of a prospective adoptee, adoptive parents voluntarily face enormous legal, moral, social, and financial obligations in choosing to adopt; therefore, they may maintain actions against agencies for intentional misrepresentation.

The court in Ferenc v. World Child, Inc., 977 F. Supp. 56 (D.D.C. 1997), aff'd without published opinion, 172 F.3d 919 (D.C. Cir. 1998) (applying District of Columbia law), anticipated the District's recognition of a tort of "wrongful adoption" for intentional misrepresentations made in the adoption context. The plaintiffs had adopted a child from Russia, following numerous assurances that were made by the United States agency that arranged the adoption and the pediatrician at the orphanage that the child was generally healthy and that he had only minor and correctable problems. The court analogized to the tort of wrongful birth, which had been recognized, and precedent from other jurisdictions, in anticipating recognition under District of Columbia law.

In Roe v. Catholic Charities of the Diocese of Springfield, Ill., 225 Ill. App. 3d 519, 167 Ill. Dec. 713, 588 N.E.2d 354 (5th Dist. 1992), the court held that adoptive parents could maintain an action in fraud against an adoption agency for misrepresentations that children were normal healthy children, while concealing records of violent and abusive behavior. In this case, the agency told three sets of adoptive parents that the children they were considering adopting were normal and healthy, and that the adoptive families would incur no extraordinary expenses for the children's care. The agency knew these affirmations to be false at the time they made them. The children had serious behavioral problems; one of the children had previously stomped the family dog to death. The parents sued the agency, alleging fraud, breach of contract, and negligence. The court held that it was an extension of the common-law to recognize fraud in the context of adoption agency misrepresentations. Public policy did not preclude recognition of actions in fraud and negligence against adoption agencies, concluded the court, since such actions do not have the effect of making adoption agencies guarantors of continued physical and mental health of adopted children.

In order to establish the causation element in a fraudulent misrepresentation or negligent misrepresentation cause of action against an adoption agency for placement of a child, an adoptive parent must establish that he asked a question that a rational parent would consider relevant to gauging the future risks of serious mental or physical illness, and that but for the adoption agency's false statement regarding that risk they would not have adopted the child. Roe v. Jewish Children's Bureau of Chicago, 274 Ill. Dec. 109, 790 N.E.2d 882 (App. Ct. 1st Dist. 2003).

There can be liability for wrongful adoption claims based on either intentional or negligent misrepresentations of the child's prior history, held the court in Mohr v. Com., 421 Mass. 147, 653 N.E.2d 1104, 74 A.L.R.5th 693 (1995). In this case, the parents adopted a six-year-old from a state adoption agency. They were told that there were no

medical records available, that the child was small for her age, and that her biological mother was young and wanted to go into nursing. The agency knew but failed to disclose that the birth mother was in fact confined to a mental institution, had chronic schizophrenia, and had a low IQ. The agency also knew but failed to disclose that the child had been given an early developmental examination that showed her to be developmentally delayed. The court noted its agreement with other jurisdictions that the straightforward application of well-established common- law principles supports recognition of a cause of action in tort for an adoption agency's material misrepresentations of fact to adoptive parents of a child's history prior to adoption.

In Reidy v. Albany County Dept. of Social Services, 193 A.D.2d 992, 598 N.Y.S.2d 115 (3d Dep't 1993), on appeal from an order denying an adoption agency's motion for summary judgment, the court affirmed, finding that the adoptive parents' claim of fraud, alleging that the adoption agency misrepresented the child's physical and mental conditions, was properly plead.

On motion for an order compelling the defendant adoption agency to respond to interrogatories seeking background information about the health of an adoptee, the court in Juman v. Louise Wise Services, 159 Misc. 2d 314, 608 N.Y.S.2d 612 (Sup. Ct. 1994), aff'd on other grounds, 211 A.D.2d 446, 620 N.Y.S.2d 371 (1st Dep't 1995), found that public policy mandates extension of common-law fraud principles to the adoption setting, and that adoption agencies can be held liable for fraud. In this case, the adoption agency told the adoptive parents that the birth mother had finished two years at a well known college and that she had been awarded a scholarship. The agency explained that she had emotional problems and that they were caused by the shock of losing a boyfriend. In fact, the birth mother had a frontal lobotomy some years before she gave birth to the baby. The child had a long history of psychological disorders and had been treated and hospitalized at numerous facilities. The complaint sought monetary damages for the agency's allegedly fraudulent misrepresentation and refusal to disclose the significant and severe psychiatric, psychological, and medical history of the child's birth mother and its withholding of other information that, if known to the adoptive parents, would have resulted in their not proceeding with the adoption of this particular child. The court, having recognized the parents' cause of action for wrongful adoption, noted that if the parents' prove the elements of fraud at trial, they could succeed in their suit.

COMMENT:

See Moreau v. Archdiocese of New York, 690 N.Y.S.2d 100 (App. Div. 2d Dep't 1999), where the court appeared to recognize a cause of action for wrongful adoption. In this case, the court, without stating any basis for the "fraud/wrongful adoption" cause of action, held that summary judgment for the defendant was not warranted where a material issue of fact existed as to whether the action was commenced within two years of the date from which the plaintiffs could have reasonably discovered the fraud.

In Parham v. Iredell County Dept. of Social Services, 127 N.C. App. 144, 489 S.E.2d 610 (1997), the court on appeal found that adoptive parents had sufficiently plead their allegations of malicious and corrupt action on the part of the adoption agency to defeat the defendant agency's motion to dismiss, where the adoptive parents alleged false misrepresentations and fraudulent concealment of material information with the intent to deceive the parents. The parents alleged that the agency represented to the parents that the adoptee was "healthy." In fact, the parents allege, the adoptee had been abused, neglected, and sexually abused while she lived with her natural mother. The parents contended that their failure to know the adoptee's true background kept them from providing the appropriate treatment for the adoptee's needs and has caused the adoptee to suffer mental anguish and emotional distress. The court concluded that such allegations were sufficient to withstand a motion to dismiss.

In Burr v. Board of County Com'rs of Stark County, 23 Ohio St. 3d 69, 491 N.E.2d 1101, 56 A.L.R.4th 357 (1986), the court held that an action for wrongful adoption may be brought by the adoptive parents of a child who claimed that material misrepresentations induced them to adopt a child who was suffering from or prone to incur mental and physical problems, provided that the elements for fraud are satisfied. A few days after the prospective adoptive parents expressed their desire to adopt a child up to six months old and were told by an agency that such placement could take from one to 1 1/2 years, an employee of the agency telephoned them and told them that a 17-month-old boy was available for adoption. A caseworker told the parents that the infant was born at the local city hospital, that the 18-year-old unwed mother was living with her parents, that the grandparents were mean to the child, and that the

mother was going out of state for better employment opportunities and had surrendered the child for adoption. Except for the age of the child, these representations were false. Over the ensuing years, the child suffered from a myriad of physical and mental problems, including speech impediments, learning disabilities, and mental retardation. During high school, he suffered from Huntington's Disease, a genetically inherited disease that destroys the nervous system. During the course of his treatment, the parents obtained a court order opening the sealed records concerning the child's background. They learned that the child's biological mother was a 31-year-old mental patient at the state hospital. The father was unknown, but presumed to have been a patient at the same institution as the mother. The mother was diagnosed as having mild mental deficiency and psychotic reactions. The story about the mean grandparents, the trip out of state, and the voluntary placement were all false. The child had been in two foster placements prior to his placement with the adoptive parents. The child suffered a fever at birth and was known to be developing slowly. The agency had test records that indicated that the child might have low intelligence and was at risk of disease. The court noted that it would be a travesty of justice and a distortion of the truth to conclude that deceitful placement of this infant, known by the agency to be at risk, was not actionable when the tragic, but hidden, realities of the child's infirmities finally came to light. The court then concluded that as a public agency charged with the legal duty and authority to arrange adoptions, governing principles of justice require that agencies be held accountable for injuries resulting from the deceitful and material misrepresentations which are foreseeably and justifiably relied on by adoptive parents.

In Gibbs v. Ernst, 538 Pa. 193, 647 A.2d 882 (1994), the court held that traditional common-law causes of action grounded in fraud and negligence apply to the adoption setting, so that an action may lie for intentional misrepresentations regarding the child's condition. [FN10] The court noted that agencies with legal authority to arrange and facilitate adoptions have an uncompromising duty to maintain integrity in dealings with adoptive parents, and should be held accountable for material misrepresentations of information regarding prospective adoptees, whether by nondisclosure or affirmative misrepresentation, notwithstanding that the jurisdiction does not specifically provide for causes of action labeled "wrongful adoption" or "negligent placement of adoptive child."

In Wolford v. Children's Home Society of West Virginia, 17 F. Supp. 2d 577 (S.D. W. Va. 1998) (applying West Virginia law), the court denied a summary judgment motion brought by an adoption agency, holding that West Virginia law recognized claims for negligent and intentional misrepresentation in the adoption context. In this case, the prospective adoptive parents specifically asked the agency whether their child's remarkable facial features were due to fetal alcohol syndrome. The agency allegedly responded that the birth mother had not used alcohol and that the child's appearance was due to a "familial look." In fact, the child had been enrolled in an early treatment program for children with fetal alcohol syndrome, and the agency was apparently aware at the time of placement that the birth mother was an alcoholic. Noting the general trend towards recognition of common-law fraud and negligence claims against adoption agencies for "wrongful adoption," the court anticipated that West Virginia state courts would likewise recognize such claims, particularly in light of West Virginia's disclosure statute, W. Va. Code § 48-4-6, and the statute authorizing private causes of action for statutory violations, W. Va. Code § 55-7-9.

[b] View that cause of action may not lie

It has been held that immunity issues prevented adoptive parents from recovering from a county adoption agency based on allegations of fraud in the adoption context.

On motion for summary judgment in a fraud and negligent infliction of emotional distress action by the adoptive parents against a county office of children and youth services arising out of the office's alleged failure to inform the adoptive parents of the mental illness of the biological parents of their adopted child who exhibited behavioral problems after adoption and eventually set fire to the family home, the court in Zernhelt v. Lehigh County Office of Children and Youth Services, 659 A.2d 89 (Pa. Commw. Ct. 1995), held that the trial court did not err in granting motion on the pleadings against the adoptive parents where, with regard to wrongful adoption actions, a state statute, 42 Pa. Cons. Stat. § 8542(a)(2), provides that liability can be imposed on the local agency only for negligent acts, which are defined as excluding acts or conduct that constitutes crime, actual fraud, actual malice, or willful misconduct. The court noted that the applicable statute, 42 Pa. Cons. Stat. § 8550, does not provide an exception allowing imposition of liability on an agency for the willful misconduct of its employees. Observing that Gibbs v.

Ernst, 538 Pa. 193, 647 A.2d 882 (1994). § 4[a], is silent on the issue of immunity and its availability as a defense for a county adoption agency, this court specifically declined to infer that a local adoption agency could not invoke the immunity defense absent a specific statement by the state supreme court.

§ 5. Failure to disclose

[a] View that cause of action may lie

The courts in the following cases recognized a cause of action based on concealment or failure to disclose relevant information to adoptive parents.

In Michael J. v. Los Angeles County Dept. of Adoptions, 201 Cal. App. 3d 859, 247 Cal. Rptr. 504 (2d Dist. 1988), where a county adoption agency made representations to an adoptive parent that a large "port wine" stain on the adopted child was merely a birthmark, and failed to disclose that the examining physician would not render a prognosis for the child, and evidence tended to show that the agency and physician knew or should have known that the stain was a manifestation of a serious neurological disorder, the court held that considerations of public policy support recognition of a cause of action for fraudulent concealment in the adoption process.

In Roe v. Catholic Charities of the Diocese of Springfield, Ill., 225 Ill. App. 3d 519, 167 Ill. Dec. 713, 588 N.E.2d 354 (5th Dist. 1992), the court held that adoptive parents could maintain an action for adoption agency negligence for failing to disclose necessary medical and psychological information to adoptive parents. Though the agency argued that Illinois did not recognize such a cause of action, the court disagreed, recognizing that one can allege a cause of action grounded in negligence against an adoption agency. In this case, the agency did not disclose to the adoptive parents the medical backgrounds of the children, even though the children had serious behavioral problems. One of the children stomped the family dog to death. The parents sued the agency, alleging fraud, breach of contract, and negligence. The court stated that since the adoption agency is the only one of the parties with the information concerning the infants' physical and psychological health, the burden of disclosure can be placed on no other party. The court noted that the consequence of placing that burden on the agency is that the agency discloses what information it has in response to an adopting parent's inquiry, so that adoptive parents assume the awesome responsibility of raising a child with their eyes wide open. The court further noted that the consequences of placing the burden of disclosure upon the agency included a party's being answerable for the consequences of their own acts or omissions. The court also rejected the agency's claim that subjecting it to liability for negligence would hinder its ability to place handicapped children for adoption.

In Mohr v. Com., 421 Mass. 147, 653 N.E.2d 1104, 74 A.L.R.5th 693 (1995), the court held that an adoption agency does have an affirmative duty to disclose to adoptive parents information about a child that will enable them to make a knowledgeable decision about whether to accept the child for adoption, citing the principle of good-faith and fair dealing and state statutory law, Mass. Regs. Code tit. 110 § 7.213(3) (1994). In this case, the parents adopted a six-year-old from a state adoption agency. They were told that there were no medical records available, that the child was small for her age, and that her biological mother was young and wanted to go into nursing. The agency knew, but failed to disclose, that the birth mother was in fact confined to a mental institution and had chronic schizophrenia and a low IQ. The agency also knew, but failed to disclose, that the child had been given an early developmental examination that showed her to be developmentally delayed. The court disagreed with the contention that the agency was immune from liability because of the discretionary function exception to governmental tort liability set forth in Mass. Gen. Laws ch. 258 § 10(b), dismissing the agency's argument that a state adoption agency's decision whether to disclose a child's background information to prospective adoptive parents is a decision based on public planning and policy and, thus, is a discretionary act.

In M.H. v. Caritas Family Services, 488 N.W.2d 282 (Minn. 1992), appeal after remand, 1995 WL 46304 (Minn. Ct. App. 1995), the court recognized a duty on the part of adoption agencies for full disclosure in the adoption context. In this case, the agency disclosed that there was a possibility of incest and a "slight" chance of abnormalities

related thereto, but failed to disclose facts including that the genetic father was the 17-year-old brother of the 13-year-old mother, and that the father was considered borderline hyperactive, tested low-average in intelligence, and was discharged from therapy at a local mental health center for failure to cooperate with his therapist. The agency later admitted that it knew of the fact that the biological parents were siblings, and that it withheld that information from the prospective adoptive parents. The agency asked the court to hold as a matter of law that recognition of a legal duty of care with respect to negligent representations of adoption agencies would not be consistent with good public policy because recognizing such a duty would place an unreasonable burden on adoption agencies to verify family histories given to them by biological parents, and because disclosure of unappealing information would discourage adoptions and stigmatize adopted children. The court rejected all of these arguments and found a compelling need for full disclosure to enable the adoptive parents to secure timely and appropriate medical care and to make critical family decisions.

In Jackson v. State, 1998 MT 46, 287 Mont. 473, 956 P.2d 35 (1998), the court denied the state's motion for summary judgment, holding that the adoptive parents could maintain a cause of action for negligent misrepresentation and negligent nondisclosure, where the adoptive parents alleged that the state agency withheld details of the child's background, even though they had extensive medical and social evaluations in their possession during conferences with the prospective adoptive parents. The state was aware before the adoption that the child's biological mother suffered from an organic or psychiatric impairment, and that both of the child's putative fathers were diagnosed with paranoid disorders. The agency told the prospective adoptive parents simply that the biological parents were not capable of or interested in caring for the child. The child was later diagnosed with pervasive developmental disorders, learning disorder, and hyperactivity disorder. The court concluded that full disclosure of a child's medical and familial background is warranted not only to enable the prospective adoptive parents to obtain timely medical care for the child, but to enable them to make the decision whether to adopt. The court also found a statutorily imposed duty to disclose in Mont. Code Ann. § 40- 8-122(1)(c), the Uniform Adoption Act of Montana. That statute provides that upon filing a petition for adoption, the court shall order an investigation by an agency, and the report shall state that medical and social histories have been provided to the prospective adoptive parent. The court interpreted this statute, in conjunction with the state's policy and procedures manual, to impose a duty on the state agency to fully and accurately disclose all relevant background information in its possession, including medical and social histories of the biological parents.

In Gibbs v. Ernst, 538 Pa. 193, 647 A.2d 882 (1994), the court held that an adoption agency has a duty to disclose fully and accurately to the prospective adoptive parents all relevant nonidentifying information in its possession concerning the child to be adopted. The court cited 23 Pa. Cons. Stat. § 2909(a) and 23 Pa. Cons. Stat. § 2533(b)(12), which create an obligation on the part of an agency to make a good-faith effort to obtain medical histories, and to disclose them fully and accurately. The court also found that the duty to disclose arises from the relationship between the adoption agency and the prospective adopting parents, which the court described as a unique one in that the parties act not as adversaries but in concert to achieve a result desired by both sides in the creation of a family unit. The court said it was in complete agreement with the commentator who observed that an adoption is not an arms length sale of widgets, and that a duty to disclose exists because a fiduciary or similar relationship of trust and confidence between the parties.

CAUTION:

In Lord v. Living Bridges, 1999 WL 562713 (E.D. Pa. 1999) (applying Pennsylvania law), a wrongful adoption action where the plaintiffs alleged that the defendants concealed the fact that the children had been seriously abused and had significant psychological problems, the court found that the adoption act did not create a private cause of action for negligent breach of the duties the act imposed and that there was no cause of action for negligent nondisclosure or omission.

In McKinney v. State, 134 Wash. 2d 388, 950 P.2d 461 (1998), the court recognized a statutory cause of action under Wash. Rev. Code § § 26.33.350 and 26.33.380 against an adoption agency for negligent failure to disclose social and medical information about a child. The court noted its belief that, based on the duty owed by adoption placement agencies established by statute, the negligent failure of an adoption placement agency to comply with the statutory disclosure mandate to prospective adoptive parents may result in liability, and such a result is supported by

public policy considerations. The court also noted the concern that a broad duty of disclosure could impose an excessive burden on adoption placement agencies who are exerting their best efforts to place children with loving adoptive parents, but stated that the scope of the agency's duty was appropriately drawn in those disclosure statutes.

The court in Price v. State, 980 P.2d 302 (Wash. Ct. App. Div. 2 1999), reversed the trial court's grant of summary judgment in favor of the defendants, and recognized a cause of action against an adoption agency for the negligent failure to disclose medical and social information about the child. The court found that this cause of action fell within the general three-year statute of limitations pursuant to Wash. Rev. Code § 4.16.080(2). The court further stated that since both the parties assumed that the discovery rule applied in this action, it also would assume that the discovery rule was applicable. The court then found that genuine issues of material fact existed as to when the plaintiffs knew, or should have known, the facts relevant to their claim against the adoption agency and reversed the summary judgment in favor of the defendants.

In Wolford v. Children's Home Society of West Virginia, 17 F. Supp. 2d 577 (S.D. W. Va. 1998) (applying West Virginia law), the court denied a summary judgment motion brought by an adoption agency, finding a duty to disclose under statutory law, W. Va. Code § 48-4-6, that requires intermediaries to provide prospective adopting parents with a written recital of all known circumstances surrounding the birth, including medical and family history of the child, and an itemization of any facts or circumstances unknown or requiring further development. In this case, the prospective adoptive parents specifically asked the agency whether their child's remarkable facial features were due to fetal alcohol syndrome. The agency allegedly responded that the birth mother had not used alcohol and that the child's appearance was due to a "familial look." In fact, the child had been enrolled in an early treatment program for children with fetal alcohol syndrome, and the agency was apparently aware at the time of placement that the birth mother was an alcoholic. Noting the general trend towards recognition of common-law fraud and negligence claims against adoption agencies for "wrongful adoption," the court anticipated that West Virginia state courts would likewise recognize such claims, particularly in light of West Virginia's disclosure statute, W. Va. Code § 48-4-6, and the statute authorizing private causes of action for statutory violations, W. Va. Code § 55-7-9.

[b] View that cause of action may not lie

The courts in the following cases found no duty to affirmatively disclose information to adoptive parents.

In MacMath v. Maine Adoption Placement Services, 635 A.2d 359 (Me. 1993), on appeal from an order entering summary judgment against adoptive parents, the court declined to recognize a fiduciary duty to disclose where there was no allegation that the agency was aware of the child's condition prior to the adoption. The adoptive parents argued that the agency breached its duty by failing to advise them as to the availability of financial subsidies for care of special needs children, and as to the prudence of postponing finalization of the adoption until the child's condition was fully diagnosed. Noting that absent a fiduciary relationship, there is no affirmative duty to disclose information, the court held that the agency's failure to inform the parents of government programs was not a breach.

See Meracle v. Children's Service Soc. of Wisconsin, 149 Wis. 2d 19, 437 N.W.2d 532 (1989), a cause of action in negligent misrepresentation where an adopted child actually contracted Huntington's Disease after the adoption agency negligently misled adoptive parents to believe that the child was not at risk, the court holding that while there is no duty to disclose, where the agency does disclose information, it must do so properly. The agency had told the parents that the child's biological grandmother had died of the disease, but that since a test for the disease on the child's father had been negative, the child would not be at risk. In fact, no such test existed. The child's father could not have been, and was not, tested. The court found that the agency assumed a duty to avoid misrepresenting the child's risk of contracting the disease when it voluntarily undertook to furnish the information and prognosis. The court was careful to point out that it did not hold that there was a duty to disclose. Rather, the court held, the agency's duty only extends to the situation where the agency undertakes to disclose information; if the agency chooses to disclose information, it must not do so negligently.

§ 6. Failure to investigate

In the following cases, the courts held that since there is no duty to investigate, alleged failures to investigate into a child's background and health were not actionable as a matter of law.

The court in Foster by Foster v. Bass, 575 So. 2d 967 (Miss. 1990), held that an action by the father of an adopted child could not, as a matter of law, be maintained against an adoption agency for mental retardation caused by a physicians' failure to test the child for phenylketonuria prior to adoption. The court stated that even if the agency was negligent in completing the child's medical information form such that it was not disclosed that the child was not so tested, as the agency had no duty to conduct the test and could not reasonably foresee injury or that physicians would be negligent in performing their duties, the agency did not breach any duty.

In Gibbs v. Ernst, 538 Pa. 193, 647 A.2d 882 (1994), the court held that agencies do not have a common law or statutory duty to investigate a child's mental and physical health. The court found no authority in Pennsylvania or other jurisdictions for the creation of a duty of reasonable investigation as a matter of common-law. Additionally, the court noted that the Adoption Act, 23 Pa. Cons. Stat. § 2533(b)(12), does not impose on adoption intermediaries a duty to investigate. Had the legislature wished to impose such a duty, noted the court, it would have done so. The court concluded that imposition of a duty to investigate cannot be grounded in a statutory directive, and absent such directive, judicial imposition of such a duty would be an undue burden on adoption agencies.

In Mallette v. Children's Friend and Service, 661 A.2d 67 (R.I. 1995), the court recognized that adoption agencies do not have a duty to investigate the medical and genetic background of the child and his or her family. The court noted that the legislature has imposed no duty on an adoption agency to use reasonable efforts to investigate. Although the court noted that the wisdom of such legislative inaction is open to question, the court stated its belief that given the competing policy concerns involved, these issues remain squarely within the legislature's prerogative.

Citing Gibbs v. Ernst, 538 Pa. 193, 647 A.2d 882 (1994), this section, the court in Nierengarten v. Lutheran Social Services of Wisconsin, 209 Wis.2d 538, 563 N.W.2d 181 (Ct. App. 1997), review granted, 212 Wis.2d 687, 569 N.W.2d 589 (1997) and rev'd on statute of limitations grounds, 219 Wis.2d 686, 580 N.W.2d 320 (1998), reconsideration denied, 220 Wis.2d 369, 585 N.W.2d 160 (1998), held that there is no directive in that state's statutory or common-law for a comprehensive investigation of a child's health history. Thus the court concluded that the record did not support any claim for breach of a duty to investigate.

§ 7. Intentional or negligent infliction of emotional distress

In the following cases, claims of intentional or negligent infliction of emotional distress were unsuccessful based on issues of immunity, physical injury, or outrageous behavior requirements.

The court granted the defendant agency's motion for summary judgment on all counts of the plaintiffs' complaint, which alleged intentional and negligent misrepresentation and intentional infliction of emotional distress in Ferenc v. World Child, Inc., 977 F. Supp. 56 (D.D.C. 1997), aff'd without published opinion, 172 F.3d 919 (D.C. Cir. 1998). The plaintiffs had adopted a child from Russia, following numerous assurances that were made by the United States agency that arranged the adoption and the pediatrician at the orphanage that the child was generally healthy and that he had only minor and correctable problems. The court set out the elements for intentional infliction of emotional distress and found no evidence in this case of a deliberate attempt to deceive or extreme or outrageous behavior on the part of the agency.

In M.H. v. Caritas Family Services, 488 N.W.2d 282 (Minn. 1992), appeal after remand, 1995 WL 46304 (Minn. Ct. App. 1995), the court upheld a dismissal of an intentional infliction of emotional distress claim, since the adoptive parents failed to prove physical injury or direct invasion of their rights by willful, wonton, or malicious conduct.

In Wilson v. Stark Cty. Dept. of Human Serv., 70 Ohio St. 3d 450, 639 N.E.2d 105 (1994), on a motion to certify

the record, the Supreme Court of Ohio upheld summary judgment in favor of the defendant state agency on adoptive parents' claims of intentional or reckless infliction of emotional distress in the adoption context, based on the state governmental immunity statute, citing Ohio Rev. Code Ann. § 2744.02(A)(1) and Ohio Rev. Code Ann. § 2744.01(B).

In Zernhelt v. Lehigh County Office of Children and Youth Services, 659 A.2d 89 (Pa. Commw. Ct. 1995), the court held that a claim for negligent infliction of emotional distress was barred by statute because the claim was actually founded on allegations of intentional wrongdoing, which would be precluded by 42 Pa. Cons. Stat. § § 8542(a)(2) and 8550.

Adoptive parents' claim for negligent infliction of emotional distress was rejected in Meracle v. Children's Service Soc. of Wisconsin, 149 Wis. 2d 19, 437 N.W.2d 532 (1989), the facts of which are discussed in § 3[a], where the adoptive parents suffered no physical injury.

§ 8. Breach of contract

[a] View that cause of action may lie

The courts in the following cases recognized adoptive parents' right to bring suit for breach of contract in the adoption context.

Summary judgment in favor of a church-related agency on a breach of contract claim was reversed by the court in Cesnik v. Edgewood Baptist Church, 88 F.3d 902, R.I.C.O. Bus. Disp. Guide (CCH) ¶ 9109 (11th Cir. 1996), cert. denied, 519 U.S. 1110, 117 S. Ct. 946, 136 L. Ed. 2d 834 (1997), which held that the adoptive parents could stand on the contract and sue for damages, where the agency told the adoptive parents that it had reviewed the medical records of the children and represented that they were perfectly normal, when the agency had not reviewed any records, and knew or had reason to know that the children would suffer severe problems, due to prenatal drug and alcohol use by their birthmother. The court analogized the situation to a seller misrepresenting the quality of goods being sold to a buyer, stating that ordinarily, a buyer of goods that are not of the quality represented has two options, the buyer can rescind the transaction by returning the goods to the seller and demanding a return of the purchase price, or the buyer can stand on the transaction and sue for damages. Here, stated the court, the adoptive parents kept the children and sought to recover the expenses they would incur in excess of those they would have incurred had the children not been disabled. The court therefore rejected the lower court's holding that the parents did not have the option of standing on the contract and suing for damages.

In Richard P. v. Vista Del Mar Child Care Service, 106 Cal. App. 3d 860, 165 Cal. Rptr. 370 (2d Dist. 1980), the court recognized the existence of a claim for breach of contract against an agency, but upheld dismissal of such claims on the facts. The prospective adoptive parents claimed that the agency breached its promise to procure a healthy child. At the time of his birth the child was healthy, in the estimation of the court, because the child's pediatrician deemed him to be healthy; thus, concluded the court, no breach occurred.

[b] View that cause of action may not lie

In this set of cases, the courts held that breach of contract claims for damages in the adoption context are not cognizable.

In Moore v. Department of Human Resources, 220 Ga. App. 471, 469 S.E.2d 511 (1996), the court affirmed summary judgment in favor of the child-placing agency on the plaintiff-adoptive parents' breach of contract claims, finding no promise by the agency, either explicit or implied, to provide an adoption free of legal entanglements.

Such a promise, the court found, would be unreasonable to make and impossible to keep.

On appeal of a verdict for damages in favor of the adoptive parent, the court in Allen v. Childrens Services, 58 Ohio App. 3d 41, 567 N.E.2d 1346 (8th Dist. Cuyahoga County 1990), jurisdictional motion overruled, 54 Ohio St. 3d 709, 561 N.E.2d 944 (1990), held that Ohio does not recognize a breach of contract claim against adoption agencies. The court found that the promise on the part of an adoption agency to provide adoptive parents with a "healthy" child did not create a contractual agreement that was broken when the child later developed a severe hearing impairment, as the only viable cause of action by adoptive parents against the adoption agency sounded in fraud, which requires that adoptive parents prove each element of the tort of fraud to prove "wrongful adoption."

The court in Wolford v. Children's Home Society of West Virginia, 17 F. Supp. 2d 577 (S.D. W. Va. 1998) (applying West Virginia law), rejected the adoptive parents' breach of contract claim, predicting that the courts of West Virginia would likely share the sentiments expressed by the Ohio Supreme Court in Allen v. Childrens Services, 58 Ohio App. 3d 41, 567 N.E.2d 1346 (8th Dist. Cuyahoga County 1990), jurisdictional motion overruled, 54 Ohio St. 3d 709, 561 N.E.2d 944 (1990), this section. The court noted that the conduct complained of fits more appropriately into a tort model than a contract model. Additionally, the court agreed with the Ohio Court of Appeals' statement that "[a] bargained-for exchange ... with respect to the life of a child is repugnant."

§ 9. Constitutional claims

The court in the following cases addressed the applicability of constitutional claims in the adoption context.

In Young v. Francis, 820 F. Supp. 940 (E.D. Pa. 1993), related reference, 832 F. Supp. 132 (E.D. Pa. 1993), the court held that it did have subject- matter jurisdiction over the claim of a violation of an adopted child's constitutional rights based on his fundamental liberty interest in life. The state adoption agency failed to disclose the child's possibly fatal neurological condition, which in fact caused his death. The court did caution that such a claim may not survive a motion to dismiss for failure to state a claim, or a motion attacking the cause of action on the merits. However, the court could not conclude that the theory of a deprivation of constitutional rights asserted on behalf of the child was so completely devoid of merit as not to involve a federal controversy. The court did, however, find that the prospective adoptive parents could not maintain a claim for interference with their liberty interest in a relationship with a child, or that the child's liberty interest in a relationship with them was denied, where the adoption was not finalized.

In Collier v. Krane, 763 F. Supp. 473 (D. Colo. 1991), the court held that an adoptive mother could not assert a cognizable claim for a violation of constitutional rights, noting that no fundamental right of familial association was implicated by conduct that occurred before the adoption. An adoptive mother brought a § 1983 action alleging that misrepresentations during the adoptive process that the child "came from good physical and mental stock" violated her constitutional rights. The court stated that with regard to the status of the plaintiff as adoptive mother, the adopted child, for all practical intents and purposes, now occupies a situation similar in many ways to that of a biological child. Holding the state liable for its role in the myriad of problems it is alleged the child now faces would be tantamount to holding the Creator liable for the defects of a child born to its natural parents, stated the court. Thus, the court concluded, the adoptive mother could not state a claim under § 1983 as she could not demonstrate that she was deprived of a right secured by the Constitution or laws of the United States.

III. APPLICATION TO PARTICULAR AGENCY ACTIONS

§ 10. Agency affirmatively assured or misstated health of child

[a] Recovery allowed or cause remanded

Courts in the following wrongful adoption cases allowed recovery or remanded the case for determination on the merits where an agency allegedly assured the health of an adoptee.

Summary judgment in favor of a church-related agency on a breach of contract claim was reversed by the court in Cesnik v. Edgewood Baptist Church, 88 F.3d 902, R.I.C.O. Bus. Disp. Guide (CCH) ¶ 9109 (11th Cir. 1996), cert. denied, 519 U.S. 1110, 117 S. Ct. 946, 136 L. Ed. 2d 834 (1997), which held that the adoptive parents could stand on the contract and sue for damages. The agency told the adoptive parents that it had reviewed the medical records of the children and represented that they were perfectly normal, when the agency had not reviewed any records, and knew or had reason to know that the children would suffer severe problems, due to the prenatal drug and alcohol use by their birthmother. The court stated that if the parents could prove existence of the contract and its breach, they could recover for damages.

In Roe v. Catholic Charities of the Diocese of Springfield, Ill., 225 Ill. App. 3d 519, 167 Ill. Dec. 713, 588 N.E.2d 354 (5th Dist. 1992), the court held that where an adoption agency allegedly represented to adoptive parents that particular children were normal and only needed lots of love, and deliberately failed to disclose records contained in adoption files which recounted numerous instances of violent and uncontrollable behavior and intellectual, social, and emotional retardation, such evidence, if proved, was sufficient to support actions in fraud and the tort of adoption agency negligence. Thus, the court reversed the trial court's dismissal of the claims and remanded for further proceedings.

In Reidy v. Albany County Dept. of Social Services, 193 A.D.2d 992, 598 N.Y.S.2d 115 (3d Dep't 1993), on appeal from an order denying an adoption agency's motion for summary judgment, the court affirmed, finding that the adoptive parents' claim of fraud, alleging that the adoption agency misrepresented the child's physical and mental conditions, was properly plead. The parents alleged that agency employees fraudulently misrepresented that the adoptee had no sexually related problems. The court concluded that the record revealed questions of fact regarding the agency's representations, whether they were material, the intent with which they were made, and the extent of the adoptive parents' damages.

In Burr v. Board of County Com'rs of Stark County, 23 Ohio St. 3d 69, 491 N.E.2d 1101, 56 A.L.R.4th 357 (1986), the court affirmed judgment for adoptive parents who alleged wrongful adoption based on an adoption agency's fraud in misstating the adoptee's health and family background. A few days after the prospective adoptive parents expressed their desire to adopt a child up to six months old and were told by an agency that such placement could take from one to 1 1/2 years, an employee of the agency telephoned them and told them that a 17-month-old boy was available for adoption. In addition to misstating the adoptee's family history, a caseworker represented to the adoptive parents that the infant was a nice, big, healthy baby boy when in fact the agency had test records that indicated that the child might have low intelligence and was at risk of disease. Over the ensuing years, the child suffered from a myriad of physical and mental problems, including speech impediments, learning disabilities, and mental retardation. During high school he suffered from Huntington's Disease, a genetically inherited disease that destroys the nervous system. During the course of his treatment, the parents obtained a court order opening the sealed records concerning the child's background. They learned that the child's biological mother was a 31-year-old mental patient at the state hospital. The father was unknown, but presumed to have been a patient at the same institution as the mother. The mother was diagnosed as having mild mental deficiency and psychotic reactions. The child had been in two foster placements prior to his placement with the adoptive parents. The child suffered a fever at birth and was known to be developing slowly. The agency had test records which indicated that the child might have low intelligence and was at risk of disease. The court found that such evidence supported the judgment for the adoptive parents.

In Gibbs v. Ernst, 538 Pa. 193, 647 A.2d 882 (1994), the court held that adoptive parents plead the elements of intentional and negligent misrepresentation and negligent failure to disclose and could proceed to trial on those causes of action against a private child placement agency and a state agency responsible for placing children who were wards of the commonwealth. The adoptive parents alleged that the agencies assured the parents on more than one occasion that the child had no history of physical or sexual abuse and that the child's history had been fully disclosed, while the child in fact did have a history of physical and sexual abuse. Immediately after the adoption was

finalized, the child began experiencing severe emotional problems. He became violent and aggressive toward younger children, attempting to amputate the arm of a five-year-old; attempting to suffocate his younger cousin; attempting to kill another cousin by hitting him over the head with a lead pipe; deliberately placing Clorox in a cleaning solution causing the adoptive mother to burn her hands badly; and starting a fire that seriously injured a younger cousin. After the adoptee's admission and evaluation at the Philadelphia Child Guidance Center, the parents were advised that little chance existed of any change in his violent behavior. Only then were the parents informed that the child had been severely abused, both physically and sexually as a young child. Records in the possession of Northwestern Institute revealed that the child had been in 10 different foster placements before he was freed for adoption; that during his first six years the child's birth mother repeatedly placed him in and then removed him from foster care; that there was a long, serious history of abuse, both physical and sexual, by his biological parents; and that the child had an extensive history of aggressiveness and hostility towards other children. The parents alleged that at no time prior to the finalization of the adoption did the adoption agencies disclose this information although it was in their possession and had been requested. The court concluded that such allegations were sufficient to allow claims of intentional misrepresentation, negligent misrepresentation, and negligent failure to disclose to go to trial.

In Meracle v. Children's Service Soc. of Wisconsin, 149 Wis. 2d 19, 437 N.W.2d 532 (1989), the court held that adoptive parents stated a claim for wrongful adoption negligence where they alleged that the child contracted Huntington's Disease after the adoption agency negligently misled the adoptive parents to believe that the child was not at risk. The parents asserted that the agency had told the parents that the child's biological grandmother had died of the disease, but that since a test for the disease on the child's father had been negative, the child would not be at risk. In fact, no such test existed. The child's father could not have been, and was not, tested. The court found that that public policy did not bar this type of suit and affirmed the appellate court's decision remanding the cause for determination on the merits.

In Nierengarten v. Lutheran Social Services of Wisconsin, 209 Wis.2d 538, 563 N.W.2d 181 (Ct. App. 1997), review granted, 212 Wis.2d 687, 569 N.W.2d 589 (1997) and rev'd on statute of limitations grounds, 219 Wis.2d 686, 580 N.W.2d 320 (1998), reconsideration denied, 220 Wis.2d 369, 585 N.W.2d 160 (1998), the court reversed summary judgment in favor of the defendant agency on the plaintiff's claim for negligent misrepresentation where the agency affirmatively represented that the child was healthy, even tempered, slept from 8 p.m. to 7 a.m., and was toilet trained, when in fact the child had attention deficit disorder and bipolar disorder, slept only five hours per night, was not toilet trained, and was given to biting and extreme temper tantrums which would last for hours, and where the agency continued to reassure the adoptive parents that the child was exhibiting normal adjustment behavior, even after the specific manifestations of his problems became known. The court concluded that, based on these allegations, the adoptive parents raised issues of material fact with respect to their negligent misrepresentation claim.

[b] Recovery denied

Courts in the following wrongful adoption cases denied recovery where an agency allegedly assured the health of an adoptee.

In Richard P. v. Vista Del Mar Child Care Service, 106 Cal. App. 3d 860, 165 Cal. Rptr. 370 (2d Dist. 1980), the court sustained a demurrer to a damages claim by parents who adopted a child who was later discovered to be suffering from health problems, since there was no proof that the adoption agency concealed facts or made material misrepresentations. The agency placed an infant in the home of the parents at their request, and informed them that the child was premature and had large earlobes but that he was otherwise a healthy child. The parents subsequently consulted a pediatrician to determine the child's mental and physical fitness, and the pediatrician apparently found him to be in good health. After the examination, the parents adopted the child. Several years later, the parents discovered that the child was suffering from severe neurological damage, hyperkinesia, and neurological immaturity. The pediatrician told the parents that the child's emotional and medical problems were predictable at birth, based on a report prepared by the agency prior to the placement in the parents' home, which stated that the child was premature and had a poor suck for one week, but that there was no neurological disease and the adoption was recommended. A copy of that report had also been furnished by the agency to the parents at the time of the

adoption. Pointing out that the agency had informed the parents of the child's state of health, the court said that no facts were alleged from which it could be inferred that the agency's statements were false. Rejecting the parents' claim that the agency's further statement that the child was in excellent health was a factual representation of the child's health not only at the time of his placement but also constituted a representation that in the future he would also enjoy excellent health, which was assertedly false, the court reasoned that predictions as to future events are deemed expressions of opinion, and are thus not actionable. While acknowledging that such predictions may be actionable where they are known to be false or where reliance on them would be induced, the court said that not only did it appear that the agency made a full disclosure of the facts, but that rather than relying on the agency's statements, the parents commenced their own investigation into the matter by consulting with their pediatrician. Thus, the court concluded, the requisite elements of reliance lacking in the alleged cause of action for intentional misrepresentation were also lacking in the cause of action for negligent misrepresentation.

The court in Ferenc v. World Child, Inc., 977 F. Supp. 56 (D.D.C. 1997), aff'd without published opinion, 172 F.3d 919 (D.C. Cir. 1998) (applying District of Columbia law), granted the defendant agency's motion for summary judgment on all counts of the plaintiff-adoptive parents' complaint, which alleged intentional and negligent misrepresentation and intentional infliction of emotional distress. The plaintiffs had adopted a child from Russia, following numerous assurances that were made by the United States agency that arranged the adoption, and the pediatrician at the orphanage, that the child was generally healthy and that he had only minor and correctable problems. The court set out the elements for the intentional torts of fraud and intentional infliction of emotional distress and found no evidence in this case of a deliberate attempt to deceive or extreme or outrageous behavior on the part of the agency.

§ 11. Agency affirmatively misstated child's familial background

Courts in the following wrongful adoption cases allowed recovery or remanded the cause for determination on the merits where an agency allegedly misstated an adoptee's familial history.

In Burr v. Board of County Com'rs of Stark County, 23 Ohio St. 3d 69, 491 N.E.2d 1101, 56 A.L.R.4th 357 (1986), the court affirmed judgment for adoptive parents who alleged wrongful adoption based on an adoption agency's fraud in misstating the adoptee's health and family background. A few days after the prospective adoptive parents expressed their desire to adopt a child up to six months old and were told by an agency that such placement could take from one to 1 1/2 years, an employee of the agency telephoned them and told them that a 17-month-old boy was available for adoption. A caseworker told the parents that the infant was born at the local city hospital, that the 18-year-old unwed mother was living with her parents, that the grandparents were mean to the child, and that the mother was going out of state for better employment opportunities and had surrendered the child for adoption. Except for the age of the child, these representations were false. Over the ensuing years, the child suffered from a myriad of physical and mental problems, including speech impediments, learning disabilities, and mental retardation. During high school he suffered from Huntington's Disease, a genetically inherited disease that destroys the nervous system. During the course of his treatment, the parents obtained a court order opening the sealed records concerning the child's background. They learned that the child's biological mother was a 31-year-old mental patient at the state hospital. The father was unknown, but presumed to have been a patient at the same institution as the mother. The mother was diagnosed as having mild mental deficiency and psychotic reactions. The story about the mean grandparents, the trip out of state, and the voluntary placement were all false. The child had been in two foster placements prior to his placement with the adoptive parents. The child suffered a fever at birth and was known to be developing slowly. The agency had test records which indicated that the child might have low intelligence and was at risk of disease. The court found that such evidence supported the judgment for the adoptive parents.

In Wolford v. Children's Home Society of West Virginia, 17 F. Supp. 2d 577 (S.D. W. Va. 1998) (applying West Virginia law), the court denied a summary judgment motion brought by an adoption agency, holding that the adoptive parents alleged facts sufficient to go to the jury on the issue of intentional and negligent misrepresentation. In this case, the prospective adoptive parents specifically asked the agency whether their child's remarkable facial features were due to fetal alcohol syndrome. The agency allegedly responded that the birth mother had not used alcohol and that the child's appearance was due to a "familial look." In fact, the child had been enrolled in an early

treatment program for children with fetal alcohol syndrome, and the agency was apparently aware at the time of placement that the birth mother was an alcoholic. The court upheld the adoptive parents' right to pursue a cause of action for fraud and negligence, based on the agency's duty to fully and accurately disclose information "surrounding the birth, medical and family medical history" of the baby. Noting that the parents alleged that as a proximate result of the agency's alleged misrepresentations, they were deprived of the opportunity to make an informed decision whether to adopt the child, and thereby incurred extraordinary medical expenses in treating his fetal alcohol syndrome without an accurate medical history, the court concluded that these allegations were sufficient to allow the parents' negligent misrepresentation claim to go to trial.

§ 12. Agency withheld information regarding health of child

In the cases that follow, the courts allowed recovery or remanded the cause for further proceedings, where an adoption agency allegedly withheld information regarding the health of an adoptee.

The court in Michael J. v. Los Angeles County Dept. of Adoptions, 201 Cal. App. 3d 859, 247 Cal. Rptr. 504 (2d Dist. 1988), found that while a claim for mere negligence could not stand, triable issues of fact existed regarding an adoptive parent's allegations of intentional misrepresentation or fraudulent concealment. An adoptive parent and her adopted son sued a county department of adoptions for negligence and fraud, alleging that the agency had failed to determine the medical condition of the child and made misrepresentations of complete health, when the child was suffering from a congenital degenerative nerve disorder. Some 10 years after his adoption, the child had seizures and was diagnosed as suffering from Sturge-Weber Syndrome, a congenital degenerative nerve disorder. Since birth, the child had a port wine stain on his upper torso and face. The agency had known, but did not disclose, stated the court, that the child's examining physician had refused to make a prognosis on the child's health when he was an infant, suggesting fraudulent nondisclosure, and the court held that there were also triable issues of fact concerning the port wine stain on the child's head and upper torso (allegedly an indication of the disease), and the agency's representation that it was merely a birthmark.

In Roe v. Catholic Charities of the Diocese of Springfield, Ill., 225 Ill. App. 3d 519, 167 Ill. Dec. 713, 588 N.E.2d 354 (5th Dist. 1992), the court held that where an adoption agency allegedly represented to adoptive parents that particular children were normal and only needed lots of love, and deliberately failed to disclose records contained in adoption files which recounted numerous instances of violent and uncontrollable behavior and intellectual, social, and emotional retardation, such evidence, if proved, was sufficient to support actions in fraud and the tort of adoption agency negligence. Thus, the court reversed the trial court's dismissal of the claims and remanded for further proceedings.

In Mohr v. Com., 421 Mass. 147, 653 N.E.2d 1104, 74 A.L.R.5th 693 (1995), the court upheld a jury verdict awarding $200,000 to adoptive parents for damages resulting from wrongful adoption due to negligent and intentional misrepresentations of fact regarding the adoptee's history prior to adoption. The parents adopted a six-year-old from a state adoption agency. They were told that there were no medical records available, that the child was small for her age, and that her biological mother placed her for adoption because she was young and wanted to go into nursing. The agency knew, but failed to disclose, that the birth mother was in fact confined to a mental institution and had chronic schizophrenia and a low IQ. The agency also knew, but did not disclose, that the child had been given an early developmental examination that showed her to be developmentally delayed. After recognizing the "wrongful adoption" action, discussed in § 3[a] and § 4[a], the court found that such allegations supported the jury verdict for the adoptive parents.

Public policy did not preclude an action for negligent misrepresentation against an adoption agency, where the agency undertook to disclose information concerning the adoptive child's biological parents and medical background to the adoptive parents, but withheld information in such a way as to mislead the adoptive parents, the court held in M.H. v. Caritas Family Services, 488 N.W.2d 282 (Minn. 1992), appeal after remand, 1995 WL 46304 (Minn. Ct. App. 1995). In this case, the agency disclosed that there was a possibility of incest and a "slight" chance of abnormalities related thereto, but failed to disclose facts including that the genetic father was the 17-year-old brother of the 13-year-old mother, and that the father was considered "borderline hyperactive," tested low-average in

intelligence, and was discharged from therapy at local mental health center for failure to cooperate with the therapist. The agency later admitted that it knew of the fact that the biological parents were siblings, and that it withheld that information from the prospective adoptive parents. The agency asked the court to hold as a matter of law that recognition of a legal duty of care with respect to negligent representations of adoption agencies would not be consistent with good public policy because recognizing such a duty would place an unreasonable burden on adoption agencies to verify family histories given to them by biological parents, and because disclosure of unappealing information would discourage adoptions and stigmatize adopted children. The court rejected all of these arguments, holding that recognition of a legal duty to disclose facts when disclosure is necessary to prevent a misunderstanding or to clarify information already disclosed which would otherwise be misleading, does not impose an extraordinary or onerous burden on agencies. Where an agency assumes a duty to disclose, concluded the court, it must refrain from making affirmative misrepresentations and from conveying information in such a way as to mislead.

The court in Jeffrey BB v. Cardinal McCloskey School and Home for Children, 257 A.D.2d 21, 689 N.Y.S.2d 721 (3d Dep't 1999), found that genuine issues of material fact existed as to whether the child placement agency had concealed the fact that the child placed in the adoptive home had been a victim of sexual abuse, whether the abuse was material at time of the placement of the adoption, whether there was a causal connection between the concealed facts and the damages sustained by the adoptive parents, and whether the agency acted with scienter, which precluded summary judgment on the adoptive parents' fraud claim. Thus, the court reversed the summary judgment in favor of the defendants.

In McKinney v. State, 134 Wash. 2d 388, 950 P.2d 461 (1998), the court found that on the facts of the case, substantial evidence supported the jury's determination that the agency's negligent failure to disclose an adoptee's medical history was not the proximate cause of the parents' decision to adopt. For six months to one year, the adoptive parents were the child's babysitters on weekends and when the foster mother was out of town. Through this contact with the child, the adoptive parents knew that the child had behavior problems including approximately twenty to thirty temper tantrums a day; there were rumors that she had been sexually abused; she was not talking; she did not engage in play like other children her age, nor did she seem to want to jump, climb, or even walk to any length; she was in a special education program; she was receiving speech therapy and physical therapy; she was receiving counseling and treatment; the child had already been in several foster homes and was removed from the biological mother due to neglect; the biological mother "liked to party"; and the child was developmentally delayed. Despite this knowledge, the adoptive parents decided to adopt the child before they ever met a caseworker. The child was placed in the adoptive parents home as a foster child, for which they received regular monthly foster care payments and a special needs allowance. The adoptive mother asked a state caseworker to have the child's medical records forwarded to the family pediatrician, but the records were not sent. The adoptive parents continued to gain more knowledge of the child's background and medical/psychological condition, and even spoke with a caseworker regarding the possibility of fetal alcohol syndrome, but they still decided to adopt the child. The adoptive parents did not receive all the medical and social records on the child's birth and upbringing until after the formal adoption, which indicated that there were questions early on that the child's problems might be attributable to her birth mother's alcohol abuse and that other theories, such as Downs Syndrome, were also considered in the records. Records also contained police reports and medical records indicating that the child may have been sexually abused. After recognizing the wrongful adoption claim based on negligence, the court held that given what the adoptive parents knew, when they knew it, and their decision to adopt the child anyway, the jury reasonably concluded any subsequent failure by the agency to disclose information played no role in the parents' decision to adopt the child and the jury verdict on proximate cause was supported by substantial evidence.

In Price v. State, 980 P.2d 302 (Wash. Ct. App. Div. 2 1999), the court reversed the summary judgment in favor of the defendant and remanded the case to the trial court where the adoptive parents' sued the defendant for wrongful adoption, based on the defendant's alleged negligent nondisclosure of material facts concerning the child's health problems. The defendant claimed that the plaintiff's claim was barred by the statute of limitations. The court found that the statute of limitations accrued on the date the agency provided the parents with the child's complete case file in response to the parents' reasonable inquiry, even though previous disclosures had made the adoptive parents aware of certain possible explanations for the child's health problems; their awareness that the agency had not disclosed all information did not put them on notice of the specific problems, since the prior documents understated the child's handicaps, and information provided only in the complete file would have been critical to the adoption

decision. Thus, the court found that genuine issues of material fact precluded summary judgment for the defendants and reversed the decision of the trial court.

§ 13. Agency withheld information regarding child's familial background

In the following cases, the courts allowed recovery or remanded the cause for further proceedings where an adoption agency allegedly withheld information regarding the familial background of an adoptee.

In Taeger v. Catholic Family and Community Services, 1999 WL 394991 (Ariz. Ct. App. Div. 1 1999), the court held that the trial court erred in directing a verdict in favor of the adoption agency and remanded the case for a new trial on the plaintiff's claim of constructive fraud based on an alleged breach of fiduciary duty by the agency for failing to disclose matters relating to the child's familial background. In the mid 1970's, the plaintiffs went through the defendant when they adopted their second child. This child developed much slower than normal and had learning problems. In 1982, the parents obtained a court order which explicitly ordered the adoption agency to provide the parents with nonidentifying medical and social background information on the child's biological parents. In response to the court order the agency incorrectly told the plaintiffs that there was nothing more in the file even though it had additional information about the child's biological mother. Finally, in 1992, the agency provided the plaintiffs with information that the child's mother had undergone psychiatric care and had taken tranquilizers while she was pregnant. The plaintiffs were also told that the biological mother's siblings suffered from depression. The court concluded that a question of fact existed as to whether a confidential relationship or fiduciary duty existed and remanded the case for a new trial on the plaintiff's constructive fraud claim.

In Ambrose v. Catholic Social Services, Inc., 736 So. 2d 146 (Fla. Dist. Ct. App. 5th Dist. 1999), the court found that the adoptive mother's fraud claim against the adoption agency which alleged that the agency had misrepresented the biological father's medical history was not conclusively barred by statute of repose, although more than 12 years had passed since the date the agency sent the father's medical history to the child's pediatrician with a cover letter stating that there were no known hereditary diseases in the father's background, where the adoptive mother alleged that the agency's duty to disclose the biological father's medical history continued until the adoption was approved by the court. Accordingly, the court reversed the trial court's dismissal of the plaintiff's complaint and remanded the case to the trial court.

In Mohr v. Com., 421 Mass. 147, 653 N.E.2d 1104, 74 A.L.R.5th 693 (1995), the court upheld a jury verdict awarding $200,000 to adoptive parents for damages resulting from wrongful adoption due to negligent and intentional misrepresentations of fact regarding the adoptee's history prior to adoption. The parents adopted a six-year-old from a state adoption agency. They were told that there were no medical records available, that the child was small for her age, and that her biological mother placed her for adoption because she was young and wanted to go into nursing. The agency knew, but failed to disclose, that the birth mother was in fact confined to a mental institution and had chronic schizophrenia and a low IQ. The agency also knew, but did not disclose, that the child had been given an early developmental examination that showed her to be developmentally delayed. After recognizing the "wrongful adoption" action, discussed in § 3[a] and § 4[a], the court found such allegations supported the jury verdict for the adoptive parents.

In M.H. v. Caritas Family Services, 488 N.W.2d 282 (Minn. 1992), appeal after remand, 1995 WL 46304 (Minn. Ct. App. 1995), the court held that where an adoption agency undertook to furnish prospective adoptive parents with information concerning the child's medical background and parentage, and disclosed the possibility of incest and a "slight" chance of abnormalities related thereto, but failed to disclose facts including that the genetic father was the 17-year-old brother of the 13-year-old mother, and that the father was considered borderline hyperactive, tested low-average in intelligence, and was discharged from therapy at a local mental health center for failure to cooperate with his therapist, the evidence was sufficient to survive summary judgment in an action for negligent misrepresentation on the part of the adoption agency. However, the court did conclude that the adoptive parents failed to make out a case of fraud, as the adoptive parents failed to allege or produce facts implying that the agency deliberately misled the adoptive parents.

In Jackson v. State, 1998 MT 46, 287 Mont. 473, 956 P.2d 35 (1998), the court held that the adoptive parents alleged facts sufficient to bring a cause of action for negligent misrepresentation in the adoption context, where the adoptive parents alleged that the state agency withheld details of the child's background, even though it had extensive medical and social evaluations in their possession during conferences with the prospective adoptive parents. The state was aware before the adoption that the child's biological mother suffered from an organic or psychiatric impairment, and that both of the child's putative fathers were diagnosed with paranoid disorders. The agency told the prospective adoptive parents simply that the biological parents were not capable of or interested in caring for the child. The child was later diagnosed with pervasive developmental disorders, learning disorder, and hyperactivity disorder. Stating that when the agency began volunteering information about the biological parents, it assumed a duty to do so with care, the court denied the state's motion for summary judgment.

On motion for an order compelling the defendant adoption agency to respond to interrogatories seeking background information about the health of an adoptee, the court in Juman v. Louise Wise Services, 211 A.D.2d 446, 620 N.Y.S.2d 371 (1st Dep't 1995), [FN11] found that since the plaintiff adoptive parents stated a cognizable cause of action for wrongful adoption, they were entitled to the disclosure of records of the natural parents' medical histories and heritage. In this case, the adoption agency told the adoptive parents that the birth mother had finished two years at a well-known college, and that she had been awarded a scholarship. The agency explained that she had emotional problems and that they were caused by the shock of losing a boyfriend. The agency refrained from disclosing the fact that the birth mother had a frontal lobotomy some years before she gave birth to the baby. The child had a long history of psychological disorders and had been treated and hospitalized at numerous facilities. The complaint sought monetary damages for the agency's allegedly fraudulent misrepresentation and refusal to disclose the significant and severe psychiatric, psychological, and medical history of the child's birth mother, and its withholding of other information which, if known to the adoptive parents, would have resulted in their not proceeding with the adoption of this particular child. The court, having recognized the parents' cause of action for wrongful adoption, noted that if the parents' prove the elements of fraud at trial, they could succeed in their suit.

In Mallette v. Children's Friend and Service, 661 A.2d 67 (R.I. 1995), the court affirmed the trial court's denial of an adoption agency's summary judgment motion, finding that the parents stated a claim for negligent misrepresentation by the agency in the adoption process. The parents asserted that, beginning in July 1991, she and her husband first began to learn the true state of the medical and genetic history of the adoptee's biological family, which was not disclosed to the parents during the adoption process. The adoptee's biological mother had been diagnosed as possessing macrocephaly, pseudoepicanthal folds, a high-arched palate, tachycardia, small clinodactyly of the fifth fingers, tremors of the hands, and poor coordination. The parents alleged that all these conditions were known by the adoption agency prior to the adoption. The parents also alleged that prior to the adoption, the parents had been informed by the agency that the adoptee's biological mother suffered from learning disabilities caused solely by head trauma as a young child, but the agency possessed a document indicating that the biological mother had been diagnosed as mildly to moderately retarded with only a "possibility" that such retardation resulted from head trauma. The document also allegedly described the adoptee's biological maternal grandmother as "intellectually limited." The parents alleged that the agency never disclosed this information prior to the adoption. The court concluded that such allegations were sufficient to create issues of fact precluding entry of summary judgment.

Research References

Total Client-Service Library References

The following references may be of related or collateral interest to a user of this annotation.

Annotations

Encyclopedias and Texts

2 Am Jurisprudence 2d, Adoption § § 24-26, 159, 162-163.

37 Am Jurisprudence 2d, Fraud and Deceit § 82.

Practice Aids

1B Am Jur Pl & Pr Forms (Rev), Adoption Forms 476, 482, 483.

1A Am Jur Legal Forms 2d, Adoption § 9:1.

32 Am Jur Proof of Facts 3d 83, Grounds for Termination of Parental Rights.

8 Am Jur Proof of Facts 2d 481, Undue Influence in Obtaining Parent's Consent to Adoption of Child.

1 Am Jur Proof of Facts 199, Adoption.

Digests and Indexes

ALR Digest Parent and Child § § 16, 22.

ALR Index Adoption of Children; Children; Concealment; Fraud and Deceit; Health; Incompetent and Insane Persons; Mental Condition or Capacity; Physical Appearance and Condition.

Research Sources

The following are the research sources that were found to be helpful in compiling this annotation.

West Digest Key Numbers

Adoption 7.6(1), 20.

Fraud 9, 10, 16, 27, 28, 49, 58(1), 58(2), 58(4).

Encyclopedias

2 Am Jurisprudence 2d, Adoption § § 24-26, 159, 162-163.

37 Am Jurisprudence 2d, Fraud and Deceit § 82.

2 CJS, Adoption of Persons § 10.

43 CJS, Infants § § 9, 73.

Texts

Crouch, Family Law Checklists (1999), § 14-1:1.

Jacobs, Children and the Law: Rights and Obligations (1995), § § 4:57-4:65.

32 Am Jur Proof of Facts 3d 83, Grounds for Termination of Parental Rights.

8 Am Jur Proof of Facts 2d 481, Undue Influence in Obtaining Parent's Consent to Adoption of Child.

1 Am Jur Proof of Facts 199, Adoption.

Law Review Articles

Fields, Note, Declaring a Policy of Truth: Recognizing the Wrongful Adoption Claim, 37 B.C. L. Rev. 975 (1996).

Emmanuel, Note, Beyond Wrongful Adoption: Expanding Adoption Agency Liability to Include a Duty to Investigate and a Duty to Warn, 29 GGULR 181 (1999).

Farmer, Note, Protecting the Rights of Hard to Place Children in Adoptions, 72 Ind. L. J. 1165 (1997).

Bernstein, Extending Tort of Negligent Misrepresentation to Adoption Context- Mallette v. Children's Friend & Service, 661 A.2d 67 (R.I. 1995), 30 Suffolk U.L. Rev. 615 (1997).

[FN1]. This annotation supersedes the one at 56 ALR4th 375.

[FN2]. This annotation addresses causes of action against licensed adoption agencies only. However, practitioners should be aware of the growing involvement of unlicensed "facilitators" in the adoption field who may be shielded from liability by contract or other law. See, e.g., Regensburger v. China Adoption Consultants, Ltd., 138 F.3d 1201 (7th Cir. 1998).

[FN3]. The scope of this annotation does not include cases in which the sole claim was for rescission or revocation of the decree of adoption.

[FN4]. See, generally, 2 Am Jur 2d, Adoption § § 159-161.

[FN5]. As to what constitutes the consent of a biological parent, see 2 Am Jur 2d, Adoption § § 96-102.

[FN6]. See 2 Am Jur 2d, Adoptions § 162.

[FN7]. See, e.g., Regensburger v. China Adoption Consultants, Ltd., 138 F.3d 1201 (7th Cir. 1998).

[FN8]. See, e.g., Nierengarten v. Lutheran Social Services of Wisconsin, 219 Wis.2d 686, 580 N.W.2d 320 (1998), reconsideration denied, 220 Wis.2d 369, 585 N.W.2d 160 (1998); April v. Associated Catholic Charities of New Orleans, 629 So. 2d 1295 (La. Ct. App. 4th Cir. 1993).

[FN9]. See, e.g., Michael J. v. Los Angeles County Dept. of Adoptions, 201 Cal. App. 3d 859, 247 Cal. Rptr. 504 (2d Dist. 1988); Mohr v. Com., 421 Mass. 147, 653 N.E.2d 1104, 74 A.L.R.5th 693 (1995).

[FN10]. See, however, Zemhelt v. Lehigh County Office of Children and Youth Services, 659 A.2d 89 (Pa. Commw. Ct. 1995), § 4[b], where the court applied immunity principles to prevent an action against a county agency for fraud in the adoption context.

[FN11]. Many of the facts contained in this setout came from the lower court opinion. See Juman v. Louise Wise Services, 159 Misc. 2d 314, 608 N.Y.S.2d 612 (Sup. Ct. 1994).

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November 17, 2003

Mr. Carl Jenkins, Esquire
JENKINS AND POVTAK, Attorneys
207 Brookes Avenue
Gaithersburg, MD 20877

Re: Adoption Liability Insurance

Dear Mr. Jenkins:

Pursuant to your request, I would like to offer the following observations regarding the availability of Professional (E & O) liability for domestic agencies that specialize or are involved in international adoption placements. We are an independent insurance agent and brokerage firm specializing in commercial property and casualty insurance, located in Maryland. I have been in this business as a licensed insurance producer since 1982. I received my Certified Insurance Counselor designation in 1992, and my Certified Risk Manager designation in 2003. I currently provide professional liability for over 25 non-profit organizations, and for 5 international adoption agencies.

The commercial liability marketplace transitioned from a cash flow (soft) underwriting cycle beginning in the second half of 2000, and was catapulted by the catastrophic events of 9/11/2001. As a result of the change in the market, the number of insurers that were writing Professional Liability insurance for international adoption agencies dwindled to a handful. Several non-profit social service insurance programs put this class of business on their respective undesirable underwriting lists. Cancellation notices were commonplace, even for agencies that displayed good loss control practices and had favorable claims histories.

As a result, the pricing that was available in the marketplace increased by sometimes 4 or 5 hundred percent. Important coverage provisions such as prior acts and punitive damage coverage become difficult, if not impossible, to arrange. In addition, any agencies that showed any claims history were routinely rejected by the underwriters, even if said claims were groundless or successfully defended.

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By way of example: (1) in one instance an established medium sized agency located in Maryland was cancelled by its program carrier in January of 2003. The package included property, crime, liability, directors and officer's liability, and social service professional liability, for an annual premium of around $6,500. After an exhaustive search and several months of being uninsured, they were able to replace similar coverages for over $53,000, an increase of 815%. In addition, they were not able to obtain prior acts coverage. (2) In a second instance an organization located in the District of Columbia that acts as a facility for international adoptions had its professional liability coverage non-renewed. To date, replacement coverage could not be found, and they are self insuring a subsequent lawsuit.

Further, I do not foresee any improvement in the coverage of liability or exposure within the industry regarding "institutionalized"social work and/or non-profit service providers in the future, considering local, national and international trends regarding legal claims and chaotic acts.

Please feel free to call me if you have any questions or if you would liked to discuss this matter further.

Sincerely,

Donald J. Butcher, CRM, CIC
President

DJB/bh

82 Ohio St.3d 563
697 N.E.2d 198

CHAMBERS et al., Appellants, v. ST. MARY'S SCHOOL, Appellee.

No. 97-1967

The Supreme Court of the State of Ohio

Appeal from the Court of Appeals for Geauga County

August 12, 1998

Syllabus

The violation of an administrative rule does not constitute negligence per se; however, such a violation may be admissible as evidence of negligence.

Douglas, Resnick and F.E. Sweeney, JJ...

Background

Appellant, Earl Chambers, was employed by the Dairymen's Milk Company as a delivery person. Chambers delivered dairy products to appellee, St. Mary's School ("St. Mary's").

In the early morning hours of November 29, 1993, Chambers made a delivery to St. Mary's. Chambers testified that there was a light snowfall on the ground. Chambers testified that prior to delivering the milk, he brushed the snow off the steps. He further averred that he did not observe any ice and consequently began his delivery. After taking the milk into the school, Chambers proceeded out the service entrance with empty crates and began down the steps, when he allegedly slipped on a quarter-inch-thick layer of ice.

Subsequent to this fall, Chambers got up and finished making his deliveries to St. Mary's. However, this time Chambers "made sure [he] was over toward the railing in case [he] started to slip he could grab it." Chambers sustained back injuries in the fall.

Chambers and his wife filed suit against St. Mary's, alleging that St. Mary's had failed to maintain its premises in a safe manner in violation of R.C. 4101.11, commonly known as the frequenter statute. Specifically, Chambers asserted that St. Mary's should have (1) constructed an awning over the area, (2) installed appropriate gutters, (3) corrected an improperly sloped roof, and (4) properly cleared and salted the area to prevent an unnatural accumulation of ice and water from collecting on the steps.

St. Mary's filed a motion for summary judgment. In opposition, Chambers asserted that his expert witness opined that St. Mary's violated several sections of Ohio's Basic Building Code ("OBBC"), including Sections 805.2 (exterior stairways shall be kept free of ice), 817.12 (exterior stairway shall be protected to prevent accumulation of ice and snow), 823.0 (means of egress lighting), and 817.7 (stairway handrails). Chambers asserted that violations of these sections of the OBBC were negligence per se. Adopting the reasoning from St. Mary's brief, the trial court granted summary judgment to St. Mary's.

Chambers appealed, asserting, inter alia, that "[t]he court of common pleas erred, as a matter of law, by granting summary judgment against [Chambers] and in favor of [St. Mary's]." Under this assignment of error, Chambers argued that St. Mary's "is liable under a negligence per se theory since appellee allegedly committed several violations of the Basic Building Code." In affirming the summary judgment for St. Mary's, the appellate court held that a violation of the OBBC is not negligence per se because the OBBC is not a legislative enactment.

Finding its judgment in conflict with Nemer v. Kerkian (Feb. 7, 1990), Summit App. No. 14143, unreported, 1990 WL 11714, and Carpas v. Carpas (Nov. 15, 1989), Summit App. No. 14043, unreported, 1989 WL 139457, the court of appeals entered an order certifying a conflict. This cause is now before this court upon our determination that a conflict exists.

Gary B. Garson Co., L.P.A., and Paul W. Flowers, for appellants.

Quandt, Giffels & Buck Co., L.P.A., and Nita Kay Smith, for appellee.

Buckingham, Doolittle & Burroughs and Scott A. Richardson, urging affirmance for amicus curiae, Ohio Association of Civil Trial Attorneys.

Michael R. Thomas, urging reversal for amicus curiae, Building Officials and Code Administrators.

Hermanies, Major, Castelli & Goodman and Richard L. Goodman; and Michael R. Thomas, urging reversal for amicus curiae, Ohio Academy of Trial Lawyers.

Opinion

Lundberg Stratton, J.

The issue certified for our review is "[w]hether a violation of the Ohio Basic Building Code may constitute negligence per se."

In order to recover on a negligence claim, a plaintiff must prove (1) that the defendant owed the plaintiff a duty, (2) that the defendant breached that duty, and (3) that the breach of the duty proximately caused the plaintiff's injury. Wellman v. E. Ohio Gas Co. (1953), 160 Ohio St. 103, 108-109, 51 O.O. 27, 30, 113 N.E.2d 629, 632; Sedar v. Knowlton Constr. Co. (1990), 49 Ohio St.3d 193, 198, 551 N.E.2d 938, 943, overruled on other grounds, Brennaman v. R.M.I. Co. (1994), 70 Ohio St.3d 460, 639 N.E.2d 425. Typically, a duty may be established by common law, legislative enactment, or by the particular facts and circumstances of the case. Eisenhuth v. Moneyhon (1954), 161 Ohio St. 367, 53 O.O. 274, 119 N.E.2d 440, paragraph one of the syllabus. Where a legislative enactment imposes a specific duty for the safety of others, failure to perform that duty is negligence per se. Eisenhuth at paragraph two of the syllabus. Application of negligence per se in a tort action means that the plaintiff has conclusively established that the defendant breached the duty that he or she owed to the plaintiff. It is not a finding of liability per se because the plaintiff will also have to prove proximate cause and damages. Pond v. Leslein (1995), 72 Ohio St.3d 50, 53, 647 N.E.2d 477, 479.

In Swoboda v. Brown (1935), 129 Ohio St. 512, 522, 2 O.O. 516, 521, 196 N.E. 274, 278, this court stated:

"The distinction between negligence and 'negligence per se' is the means and method of ascertainment. The first must be found by the jury from the facts, the conditions and circumstances disclosed by the evidence; the latter is a violation of a specific requirement of law or ordinance, the only fact for determination by the jury being the commission or omission of the specific act inhibited or required."

"In other words, if a positive and definite standard of care has been established by legislative enactment whereby a jury may determine whether there has been a violation thereof by finding a single issue of fact, a violation is negligence per se; but where the jury must determine the negligence or lack of negligence of a party charged with the violation of a rule of conduct fixed by legislative enactment from a consideration and evaluation of multiple facts and circumstances by the process of applying, as the standard of care, the conduct of a reasonably prudent person, negligence per se is not involved." Eisenhuth at 374-375, 53 O.O. at 278, 119 N.E.2d at 444.

Thus, the application of negligence per se effectively reduces the elements that a plaintiff must prove in a negligence action. Hernandez v. Martin Chevrolet, Inc. (1995), 72 Ohio St.3d 302, 304, 649 N.E.2d 1215, 1216. Negligence per se is tantamount to strict liability for purposes of proving that a defendant breached a duty. See Lonzrick v. Republic Steel Corp. 1966), 6 Ohio St.2d 227, 250, 35 O.O.2d 404, 417, 218 N.E.2d 185, 200 (Taft, C.J., dissenting).

Since the application of negligence per se effectively reduces the plaintiff's burden of proof in a tort case, we must carefully examine whether an extension of negligence per se to violations of administrative rules is justified.

In Eisenhuth, this court held that a violation of a "legislative enactment" was negligence per se. Chambers asks us to extend the doctrine of negligence per se to violations of the OBBC, which constitutes administrative rules. In order to make such a decision, we must determine whether there are any material differences between statutes and administrative rules which would preclude us from extending the application of negligence per se to violations of administrative rules.

Legislative authority is vested with the General Assembly. Belden v. Union Cent. Life Ins. Co. (1944), 143 Ohio St. 329, 28 O.O. 295, 55 N.E.2d 629, paragraph one of the syllabus. A legislative enactment, or statute, is initially introduced as a bill. Section 1 (A), Article II, Ohio Constitution. The introduction of a bill is a manifestation of public policy, which is determined primarily by the General Assembly. See State v. Smorgala (1990), 50 Ohio St.3d 222, 223, 553 N.E.2d 672, 673-674.

A bill may originate in either the House of Representatives or the Senate. Section 15(A), Article II, Ohio Constitution. All bills are subject to debate, discussion, and amendment prior to being put to a vote. Id. Once all amendments are made, the bill must still be passed by a concurrence of a majority of members from both the Senate and the House of Representatives and be signed by the Governor before it becomes law. Sections 15 and 16, Article II, Ohio Constitution.

Members of the General Assembly are accountable to their constituents because they are elected to office. Section 2, Article II, Ohio Constitution. If the constituents are unhappy with policy determinations made by members of the General Assembly, they can change the makeup of the General Assembly at the voting booth. Thus, in effect, citizens of the state may shape the nature of legislation.

The legislative process and accountability are the cornerstones of the democratic process which justify the General Assembly's role as lawmaker. In contrast, administrative rules do not dictate public policy, but rather expound upon public policy already established by the General Assembly in the Revised Code. " 'The purpose of administrative rulemaking is to facilitate an administrative agency's placing into effect a policy declared by the General Assembly in the statutes to be administered by the agency.' " Doyle v. Ohio Bur. of Motor Vehicles (1990), 51 Ohio St.3d 46, 47, 554 N.E.2d 97, 99, quoting Carroll v. Dept. of Adm. Serv. (1983), 10 Ohio App.3d 108, 110, 10 OBR 132, 133, 460 N.E.2d 704, 706. Yet determination of public policy remains with the General Assembly. State ex rel. Bryant v. Akron Metro. Park Dist. for Summit Cty. (1929), 120 Ohio St. 464, 479, 166 N.E. 407, 411-412, affirmed State ex rel. Bryant v. Akron Metro. Park Dist. For Summit Cty. (1930), 281 U.S. 74, 50 S.Ct. 228, 74 L.Ed. 710. Administrative agencies may make only "subordinate" rules. Belden v. Union Cent. Life Ins. Co. (1944), 143 Ohio St. 329, 342-343, 28 O.O. 295, 301, 55 N.E.2d 629, 635-636; see, also, Redman v. Dept. of Indus. Relations (1996), 75 Ohio St.3d 399, 404, 662 N.E.2d 352, 357; Blue Cross of Northeast Ohio v. Ratchford (1980), 64 Ohio St.2d 256, 259, 18 O.O.3d 450, 452, 416 N.E.2d 614, 617.

Unlike the legislative process, rulemaking by administrative agencies does not involve the collaborative effort of elected officials. Directors of administrative agencies are appointed by the Governor. R.C. 121.03. It is these directors and/or their employees who propose and adopt administrative rules. Administrative agencies have the technical expertise to compose such rules. Farrand v. State Med. Bd. (1949), 151 Ohio St. 222, 39 O.O. 41, 85 N.E.2d 113. However, administrative agencies have no accountability as do the members of the General Assembly.[2]

The specific issue before this court is whether a violation of the OBBC is negligence per se. However, our comparison of the legislative process and the rulemaking process dictates that we examine this issue in the broader context of whether violations of any administrative rules should require the application of negligence per se.

If we were to rule that a violation of the OBBC (an administrative rule) was negligence per se, we would in effect bestow upon administrative agencies the ability to propose and adopt rules which alter the proof requirements between litigants. Altering proof requirements is a public policy determination more properly determined by the General Assembly because the General Assembly, as opposed to administrative agencies, has the authority and accountability to dictate public policy. Giving administrative agencies the ability to adopt such rules would be tantamount to an unconstitutional delegation of legislative authority, since administrative agencies cannot dictate public policy.

Further, scores of administrative agencies propose and adopt perhaps hundreds of rules each year. Considering the sheer number and complexity of administrative rules, a finding that administrative rules establish negligence per se could open the floodgates to litigation. Strict compliance with such a multitude of rules would be virtually impossible. In effect, it would make those subject to such rules the insurer of third parties who are harmed by any violation of such rules.[3] Only those relatively few statutes which this court or the General Assembly has determined, or may determine, should merit application of negligence per se should receive such status.

For all the aforementioned reasons, we hold that the violation of an administrative rule does not constitute negligence per se; however, such a violation of an administrative rule may be admissible as evidence of negligence. Stephens v. A-Able Rents Co. (1995), 101 Ohio App.3d 20, 27-28, 654 N.E.2d 1315, 1320.

The OBBC constitutes administrative rules proposed and adopted by the Board of Building Standards, an administrative agency, whose members are appointed by the Governor. Ohio Adm.Code 4101:2-1-03, R.C. 3781.07, and 3781.10. Therefore, a violation of the OBBC is not negligence per se. Accordingly, we affirm the judgment of the appellate court.

Judgment affirmed.

Moyer, C.J., Pfeifer and Cook, JJ., concur.

Douglas, Resnick and F.E. Sweeney, JJ., dissent.

Douglas, J., dissenting.

I dissent from the judgment and opinion of the majority. Today the majority has determined that a violation of the Ohio Basic Building Code may never constitute negligence per se. What is even more shocking is that the majority further holds that the extension of the doctrine of negligence per se to violations of any administrative rules is never justified. The breadth of the majority opinion is alarming and, in addition, is simply wrong! To that end, the conclusions reached by the majority have disturbed well-settled law and have effectively overruled numerous decisions of this court.

We have held time and time again that an administrative rule issued pursuant to statutory authority has the force and effect of law unless it is unreasonable or is in clear conflict with a statute governing the same subject matter. See, e.g., Youngstown Sheet & Tube Co. v. Lindley (1988), 38 Ohio St.3d 232, 234, 527 N.E.2d 828, citing Kroger Grocery & Baking Co. v. Glander (1948), 149 Ohio St. 120, 125, 36 O.O. 471, 474, 77 N.E.2d 921, 924. See, also, State ex rel. Kildow v. Indus. Comm. (1934), 128 Ohio St. 573, 580, 1 O.O. 235, 238, 192 N.E. 873, 876. Indeed, this court has also implicitly agreed that a tortfeasor may be negligent per se in violating a relevant administrative regulation. See Merchants Mut. Ins. Co. v. Baker (1984), 15 Ohio St.3d 316, 15 OBR 444, 473 N.E.2d 827. The majority, however, has turned a blind eye to these and other important cases decided by this court.

Accordingly, for the foregoing reasons, I must dissent.

Resnick and F.E. Sweeney, JJ., concur in the foregoing dissenting opinion.

Footnotes:

1. St. Mary's in its motion for summary judgment argued that it owed no duty to Chambers for any risks associated with accumulations of ice and snow, or alternatively that even if St. Mary's had a duty to Chambers because of an unnatural accumulation of ice, no liability attaches to St. Mary's because it had no knowledge of the condition and the condition was open and obvious. [Back]

2. Administrative rulemaking is subject to the conditions set out in R.C. 119.01 to 119.13. Generally, these conditions require that notice be given of a public hearing to be held on a proposed rule, where persons affected thereby may comment and present evidence pertaining to the unreasonable or unlawful effect of the rule. R.C. 119.03(A). The rule is then reviewed by the Joint Committee on Agency Rule Review, which may, under certain circumstances, recommend that the General Assembly adopt a resolution invalidating the rule. R.C. 119.03(I). Assuming that the rule is not invalidated at this point, it is still subject to invalidation at the next regular session of the General Assembly. R.C. 119.03(I)(2)(b). If the rule is not invalidated at that session, then the agency may issue an order adopting the rule. R.C. 119.03(D).

These conditions provide constraints in rulemaking. However, they do not elevate rulemaking to the status of lawmaking for purposes of applying negligence per se to violations of administrative rules. [Back]

3. For example, Section 805.2 of the OBBC requires that all exterior stairways be kept free of ice and snow. The language in this rule mandates removal of snow from steps without reference to any exceptions or a reasonableness standard. An application of negligence per se to such a rule would essentially make a premises owner or occupier strictly liable for a slip and fall as soon as snow started to fall. It would be virtually impossible for a premises owner to comply with such a strict standard.

In the case at bar, the snow fell in the very early morning hours just prior to Chambers's arrival at St. Mary's. It is unreasonable to require St. Mary's to keep a worker on call twenty-four hours a day to remove snow at a moment's notice.

THE Bulletin
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The Joint Council
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Inside this issue...

The Value of Post-Adoption Services

by Marilyn Schuettle

Not many years ago, adoption agencies focused their energies primarily on the intricacies of parent preparation and placement. Today, adoption practice has changed, research has expanded, and agencies as well as families face new challenges. Parent preparation remains crucial, but post-placement services can be equally important.

Parent preparation remains crucial, but post-placement services can be equally important.

When parents need help with what appear to be adoption-related issues — whether immediately after placement or 15 years later — they may turn to their agencies for answers. Agencies can provide support and understanding, but sometimes parents need more in-depth services. If agencies are not able to provide those services, it is important that they steer parents in the right direction to find resources which address the needs of the family.

The need for post-adoption services has been confirmed in a number of studies in the past 20 years. While much of the research has focused on children placed through the U.S. public child welfare system, the lessons learned apply to many children who have joined their families through intercountry adoption, particularly post-institutionalized children.

Some common services

The goal of post-adoption services is simple, but critically important — to increase the likelihood of success for adoptees and their families by helping them with the special challenges of adoption. Services can vary: providing opportunities for children to meet other adoptees and normalize adoption experiences, assisting parents with finding and obtaining special educational services, counseling families regarding a return to their children's country of birth.

Post-adoption services also help families identify and access very specific services that address difficulties created by circumstances related to adoption, such as early trauma and deprivation resulting in medical issues, developmental delays, and emotional disabilities.

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PART ONE OF A TWO-PART SERIES

The Future of Adoption Agency Liability

by Carl A. Jenkins

Wrongful adoption refers to a claim brought by parents, on behalf of themselves and/or the child, against adoption agencies as a result of misrepresenting the child's health, psychological background, or social history, in order to obtain money for damages associated with the cost of care and/or emotional pain and suffering.

The legal claim of wrongful adoption was first recognized by the Ohio Supreme Court in 1986 (Burr vs. Board of County Commissioners, 491 N.E. 2d 1001 [Ohio 1986]). Since that time, the legal claim of wrongful adoption has spread across the United States with conflicting decisions. Because of the 10th Amendment nature of the claim, (a civil lawsuit for money damages, as opposed to a criminal charge involving incarceration), both the adoption process and the legal issues involved are independently regulated by the individual states.

While it is generally agreed that adoption agencies should not be required to guarantee the health of children made available for placement, the actual scope of an agency's responsibility varies between jurisdictions, and is based upon local statutory requirements and prior court decisions.

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Protection of Child Victims of Hurricane Mitch: The ISS Perspective

Joint Council members have been actively working on humanitarian efforts for the victims of Hurricane Mitch. Our efforts and prayers for the people of Central America are greatly needed, and we are gratified to see the response of Joint Council member agencies. Certainly this significant response is in keeping with Joint Council's overall mission.

One "side effect" of the interest in aid for Central America has been a growing number of requests for information about the adoption of children in the affected countries. Recently we received a communiqué from International Social Service (ISS), an international non-governmental organization which helps people with personal or social problems resulting from migration and international movement. It is available at the ISS web site, www.childhub.ch/iss.

Helping children

Briefly, the communiqué, titled "How to Help Children in the Aftermath of Hurricane Mitch," dated November 28, 1998, recommends that aid concentrate on supporting families to ensure their survival, on emergency health and food programs, and on the rapid reconstruction of family and community living areas. It urges prompt rebuilding of various infrastructures as well as the renewal of agriculture and other sources of family income.

The communiqué recommends that those wishing to help the children of Central America make financial and professional contributions to organizations and efforts to ensure that the children's basic needs (shelter, food, medical care, affection, education, etc.) are met as efficiently as possible. Children who have been separated from their families should be reunited as quickly as possible. Children for whom no family member has been identified by the end of the search period (recommended to be at least a year) should be placed with families in their community, their country, or with their family members living abroad. Only after these efforts have been made should intercountry adoption be considered, according to the ISS communiqué. These recommendations are consonant with Joint Council philosophy, though we may differ on some specifics.

Aid to Central America

JCICS member agencies recommend the following organizations providing aid in Central America:

- Sister Teresa Gonzales
  Convento Notre Dame
  Apartado Postal 26
  El Progreso, Yoro, Honduras
  (For more information, contact Hannah Wallace, Adoptions International, HWall334@aol.com.)
- Latin America Community
  Assistance Foundation
  Box 21000
  Castro Valley, CA 94546
  (For more information, contact 510-886-0981, or laca@lacafoundation.org.)

Conference on Post-Institutionalized Children

by Maureen Evans

In October I represented Joint Council at a conference titled "Post-Institutionalization: The Internationally Adopted Child," co-sponsored by the Children's National Medical Center in Washington, DC, and the Parent Network for the Post-Institutionalized Child.

On October 16 and 17, conference participants (including Joint Council President Michelle Hester and many other agency professionals) heard from speakers including Dr. Murray Feshback, Romania's Secretary of State Dr. Christian Tabacaru, Dr. Dana Johnson, Attorney Les Scherr, Uniting Families Foundation (a Joint Council member) Director Lynn Wetterberg, Dr. Philip Pearl, Dr. Ron Federici, and others. Information provided by these presenters was valuable and timely.

U.S. Ambassador to Romania James Rosapepe also spoke at the conference, stating that there is "nothing more important that the U.S. is doing than adoption." He urged families to be in contact with the U.S. Embassy with questions or problems. The e-mail address is bucharest@bucharestb.us-state.gov. I had a chance to speak with Ambassador Rosapepe and provide him with information about Joint Council.

On October 18, I attended a panel discussion which covered a wide range of topics involving adoption issues. Dr. Tabacaru was one of the speakers, and he stressed Romania's efforts to provide accurate information and to make placements as quickly and appropriately as possible, both within Romania and internationally.

This brief synopsis does not do justice to the material provided at the conference. Please let me know if you would like additional information.

Adoption Agency Liabilities — continued from page 1

Different theories of the claim

The types of legal claims fall into two basic categories: intentional torts and negligent torts. Intentional torts include acts that are both: (a) overtly fraudulent and/or misrepresentative, and also (b) fraudulent concealment, and/or the intentional withholding of significant information. This legal theory is based upon the idea that such behavior was premeditated, with "malice aforethought."

Negligent torts include acts that are unintentional in nature, and embody (a) unintentional misrepresentation and (b) the unintentional withholding of information, or a failure to disclose information. This theory is based upon the legal assertion there existed a duty to use due care, which the agency failed to meet.

There recently has also been (c) a negligence legal theory of an affirmative duty by an agency to reasonably research or investigate the information an agency is provided by third-parties, and which the agency then, in turn, provides to its clients. This theory suggests that an agency has, at least, a limited duty to "vouchsafe" or "guarantee" the information it receives from independent, third-party sources.

Limiting legal exposure

There are three main considerations in trying to limit an agency's legal exposure to these claims of wrongful adoption:

- Legal standards vary from state to state
- Liability theories include both overt actions and failures to act, and
- The individual facts of each case control the application of legal standards to liability theory.

Consequently, the ultimate outcome of any single lawsuit can be best described as problematic, depending upon the location of the conduct in question, the theory of liability pursued by the complaining parents, and the circumstances surrounding the actual event(s).

However, through a combination of good policy and procedure, coupled with a legal self-defense approach to service agreements, the potential exposure of an agency to crippling litigation can be significantly reduced.

Best interest of child standard

Historically, child welfare licensing statutes and judicial involvement with "family matters," particularly in regard to children, have focused on a "best interest of the child" standard. This evolved from the legal concepts

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of the state intervening either as *Parens Patri*, or in *loco Parentis*. As examples: *Parens Patri* allows a school Vice-Principal to search all students' lockers without having first obtain a search warrant; *in loco Parentis* allows Family Courts to establish a minimum base level of child support in divorce and custody cases.

In one legal concept, the state acts as the parent for all children, and in the other, the state stands in as the parent of an individual child, but in both cases the state overtakes the parents as the "interested party" on behalf of the child's welfare. This legal concept does not allow for consideration of the child's parents' interest, except as incidental to the child's interest.

Newly evolving standards

Some recent legal case law has begun proposing newly evolving standards that, in "social services" transactions between an adoption agency and potential adoptive parents, different legal standards may be appropriate. One common element in this new standard movement is to specifically account for the adoptive parents' interests.

The new theories are grounded in the concept of "public policy," in that the state has a duty to protect the interests of all the individuals involved in the transaction (i.e., agencies, children, parents, the state, and often others as well).

One shift involves redefining legal relationships towards potential parents involved in agency transactions because it should be "...one of trust and confidence, differing significantly from a business arrangement...[acting] not as adversaries, but in concert to achieve a result desired by both sides, the creation of a viable family unit..." (McKinney vs. State of Washington, 950 P.2d 461 at: 466 [1998 en banc]). This model places a significant affirmative duty on adoption agencies and seems, in part, to make the agency at least partially a guarantor of a child's health when offered for adoption to potential parents.

Another recent proposition advocates abrogation of the public policy doctrine of "limited immunity," which some states apply to "social services" transactions. The immunity theory operates as a barrier to tort claims so that adoption agencies may operate without fear of a constant second-guessing of their decisions by others, the abrogation argument proposes that, because of the unequal relationship between the parties (agency vs. parents), a minimum affirmative duty standard by the agency must be maintained to assure all involved of the requisite "trust and confidence."

In some instances, these evolving standards are changing as a result of new, statutory legislation being introduced in some states. Some states, by historical legal court precedent, view the rights, duties, privileges, and obligations of the various parties to "social transactions" differently from their neighboring sister-states. These competing-evolving standards are in significant measure responsible for the tension presently experienced by litigation advocates on both sides of the aisle.

Good policy and procedure, coupled with a legal self-defense approach to service agreements, can reduce the potential exposure of an agency to crippling litigation.

Validation of traditional legal theory

Recent litigation, however, has affirmed the continued viability of the old, basic "contract law," at least in some jurisdictions. In Ferenc vs. World Child (Ferenc, et al, vs. World Child, et al, 977 F. Supp. 56, [1997, U.S. Dist. Ct., D.C.], affirmed, U.S. Cir. Ct., D.C. [1998, No. 97-7167]), the Federal Circuit Court for the District of Columbia upheld the validity of contract waiver clauses in service agreements between agencies and potential adoptive parents.

During the course of that wrongful adoption litigation, several theories of claims were proffered to the Court, including, but not limited to: (1) fraudulent or intentional misrepresentation; (2) negligent misrepresentation; (3) failure of a duty to adequately investigate the child's medical and social history; and (4) waiver clauses in contract are void as a matter of public policy.

Eventually the Court dismissed all of the plaintiffs' claims prior to trial, finding in favor of the defendants that there was no fraud or intentional misrepresentation, and that waiver clauses were valid as a matter of public policy in contract cases. All other legal claims were either dismissed outright, or the Court declined to address their merits in light of its findings on the first two legal principles.

That particular decision was significant for several reasons. Not only did it recognize for the first time in the District of Columbia the tort of wrongful adoption, it is the first reported Federal Circuit Court decision regarding wrongful adoption from an Article One (U.S. Constitution) jurisdiction — that is, it fashioned Federal law, not the law of an individual state.

Also, the case decided the issue of whether a general, or blanket, waiver clause in a service contract (adoption services agreement), involving "social service" transactions would withstand intensive legal scrutiny. In effect, while not directly addressing some of the newer legal theories previously mentioned, the case did reaffirm basic, long-standing contract law regarding the equal bargaining power and competing interests of the different parties involved in the transaction to "provide services."

Finally, although preempted from ruling on the legal concept of "assumption of risk" as a result of the validity of the "waiver clause," the Court discussed the legal concept. This legal philosophy goes to the underlying framework for the newly-emerging legal standards. The discussion by the Court in Ferenc suggests that some of these newer concepts, such as public policy, duty to investigate, unequal bargaining status, and limited immunity are in conflict with established legal doctrine, and may not be valid.

By reaffirming traditional contract concepts as it pertains to "social services" agreements, the Federal Court has now set the stage for the next level of legal standards decision-making, i.e., assumption of risk — who really is responsible when bad things happen to good people?

Carl A. Jenkins is Associate Director and General Counsel of World Child, Inc., 1400 Spring St., Suite 410, Silver Spring, MD 20910; 301-588-3000.

Part Two of this series will discuss the law and anticipate future trends in regard to assumption of risk by and informed consent of the prospective adoptive parents. It will also look at third-party agreements agencies may have with independent contract representatives, and set out recommendations for practices and procedures.

The Bulletin of the Joint Council on International Children's Services

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Inside this issue...

A Voice for Children

The Hague Convention on Intercountry Adoption and its implementing legislation were introduced in Congress in March; the Hope for Children Act seeks to make permanent the tax credit for adoption expenses; leave equity for adoptive parents is likely to be considered this session — these are all powerful reasons for you to learn about and exercise your influence over federal legislation.

The following "advocacy tips" were adapted from materials provided by the Child Welfare League of America.

Making your agenda a reality

You don't have to be a high-powered, well-paid, politically connected Washington lobbyist in order to have an effect on Congress and the legislation it passes. You are the people who elect a Member to Congress and therefore the most important influence in your Senator's or Representative's political life.

Your elected representatives in Congress take very seriously written letters, e-mail messages, and personal visits from you regarding a particular issue — it's their job. Senators, Representatives, or their staff will return your phone calls, answer your letters, and make appointments to meet with you.

As a voter, you are the most important influence in your Senator's or Representative's political life.

You can strengthen your effectiveness as a grass-roots lobbyist by using some of the techniques discussed below.

Writing Members of Congress

In many cases, a letter expressing a given viewpoint can change a legislator's mind. It is particularly helpful when a member is wavering on an issue. If, despite your literary talents, your legislator's vote is still unfavorable to your position, don't be discouraged — it probably means that the other viewpoint was lobbying even harder than you.

Personalized (even handwritten) letters on your own stationery are the most effective. While form letters, post cards, petitions, or e-mail messages are all read and answered, they don't carry the weight and persuasive power that a letter from a constituent does.

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PART TWO OF A TWO-PART SERIES

Limiting Adoption Agency Liability

by Carl A. Jenkins

Because of the personal and emotional nature of adoption, it is nearly impossible to predict when a lawsuit will show up, or what will be the exact factual grounds which give rise to a claim for "Wrongful Adoption." Regardless of how well-informed the clients are, or how carefully drawn the limitations upon the services to be provided, the facts surrounding any alleged claim for damages will control both the legal theory and its application to a specific instance.

This is where good policy and practice will pay off — good routines and habits beget good results. Even so, good policy, practice, and defensive legal precautions may not prevent an actual lawsuit.

This article will review certain precautions and affirmative actions an agency can take to protect itself from future liability, and ensure its continued survival to accomplish its mission, in the event a lawsuit does arrive.

Assumption of Risk

The purpose of a contract is to set the terms and conditions of performance of mutually agreed-to actions (services and/or products) between two or more parties, prior to initiation

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Y2K: Some Resources for the Unknown

by Maureen Evans

As the year 2000 approaches, we are ng all sorts of predictions about what t happen: computer meltdowns, com- unication delays, technological mayhem. Given the fact that adoption agencies are part of a global family of technology (and some relatives are more stable than others), you need to give some serious thought to this matter now, if you haven't yet.

A recent issue of Foundation News and Commentary noted the following:

- Just because your computer is ready doesn't mean everyone else's is.
- The failure of microchips could affect all sorts of outside systems, here and overseas.
- What about liability for potential Y2K-related consequences?

Computer experts themselves disagree about the possibilities, but adoption agencies should not turn away, and should instead make some preparations. To that end, Ann Scott of PLAN Loving Adoptions Now (503-472-8452) has shared the draft disclaimer the agency's attorney has proposed. I strongly urge all agencies to consult their own attorneys as soon as possible.

ft Y2K Disclaimer

e Board of Directors of PLAN Loving Adoptions Now, Inc., is aware of the predictions that communication, transportation, and other systems may be affected to some extent by what is commonly referred to as the "millennium bug" or "Y2K." (These are shorthand terms for unknown problems that may arise due to computer systems that are not programmed to read the year 2000 as a two-digit number.) As you are aware, there is no consensus even among the "experts" as to what problems, if any, we are going to encounter.

Based on the varied predictions that are being disseminated throughout the U.S., PLAN must consider the possibility that adoptions may slow down or stop completely for a period of time early in the year 2000.

PLAN relies heavily upon telephone lines for communication (by phone, fax, and e-mail), international adoptions require airline travel, and the paperwork for the adoption process is computer dependent in many of the countries in which we work. It is the intention of the Board of Directors and PLAN to do whatever is necessary to insure that PLAN's computers are Y2K compliant by December 31, 1999. However, because we have no way of knowing how long other computer systems may be inoperable, PLAN cannot predict what delays, if any, may result after January 1, 2000.

Please sign and date the statement below and return this form.

We/I have read and understand the foregoing Y2K disclaimer and hereby agree to hold PLAN Loving Adoptions Now, Inc., harmless from any and all liability for damage, loss, delay, or failure of our adoption due to "Y2K" effects beyond the control of PLAN. We desire to continue with the adoption process with the knowledge that there may be unforeseen problems with this process due to "Y2K" and its effects.

Limiting Liabilities — continued from page 1

of the performance. That is, to set the boundaries or parameters of the bargained-for agreement.

There are numerous other terms of the services to be provided which can be negotiated, allocated, divided, quantified, and the like, with the litmus test in "social service" transactions generally of the "reasonableness" standard. That is, if some contract terms are "unconscionable" or "against Public Policy" then they will not be upheld by a Court. (Examples include fraud, usury, or conspiracy to commit a criminal act.)

Adoption agency contracts are agreements to perform services, which place them in a distinct category from some other forms of contract. Therefore, the legal phrasing and detailing in the agreement of exactly what services are contracted for, and under what conditions, become critical, when, for reasons beyond the control of any or all of the parties involved, the bargained-for results either do not occur, or do not occur to the nominal satisfaction of one or more of the contracting entities.

A carefully drawn legal document can limit an agency's future potential exposure, as certain variables, in particular the risk of a "less than perfect" adoption (however defined), can be contractually allocated between the parties.

This concept is known as Assumption of Risk, and it has been the subject of much historical litigation, beginning when the first, prehistoric sailor ever left one port with the intent of transporting an object to another port for profit.

Waiving negligence

In addition to allocating the Assumption of Risk and other terms of agreed-to services, the parties can also agree to waive, in advance, potential future claims they may acquire.

Under traditional contract law, parties are permitted to waive negligence. The recent holding by the Federal Circuit Court for Washington, D.C., of the waiver clause in an adoption services agreement is important because the majority of the "new" theories of liability rely on some form of "duty" owed by the service providers to the client(s). Normally the breech of this duty is most often found in the failure to act, rather than an overt or intentional miscreant behavior. (It is generally agreed that a claim for intentional fraud cannot be waived, regardless of any contractual language, because that would be both unreasonable and against Public Policy.)

This unintended failure usually resonates as some form of negligence. Again, how-

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ever, the litmus test of negligence in a failure to act is usually based upon some scale of reasonableness — if the behavior in question is too extreme, it becomes actionable.

Informed Consent

Informed Consent is the process by which a person making a major, life-affecting decision becomes completely familiar with all the material and relevant details which would influence that person's choice in reaching such a decision.

As a "good practice" standard, Informed Consent is simply good business. As a barrier to legal exposure, Informed Consent is (1) an absolute, (2) non-equivocal, and (3) necessary prerequisite to beginning to perform adoption-related services. An uninformed consent and/or waiver is meaningless, and will be treated by any court as exactly that.

(Think: What did the surgeon do when your father underwent heart bypass surgery? The doctor had him sign a "release and waiver" after a full, written review of the risks involved, which your father agreed to and consented — in writing — to the operation. Importantly, one does not request a "consent" after the patient is on the operating table, with the scalpel already in service.)

An agency should not perform adoption-related services before the client(s) have agreed, and consented to, the terms of the service about to be performed...timing is everything.

Should an agency offer a child for adoption prior to the client(s) signing a service agreement, the consent and waivers may be void, because of possible "coercion" claims (the adoptive jargon is "dangling").

Informed Consent acknowledgments aid in a "negligence" lawsuit because all parties have agreed, in advance and before initiation, that the terms of service would also include who is going to assume the risk of any unintended mistake alleged to have occurred during the course of the "social services" transaction.

Knowing and intelligent waiver

For a waiver to be valid as a result of informed consent, the terms must be clear.

There are certain phrases called "legal terms of art" (also called "standard boilerplate") with which all attorneys are familiar because they mean the same thing everywhere. At a minimum a service agreement should contain these terms. In addition, the clients should be advised in writing that they have the opportunity to consult with outside third-parties — doctors, lawyers, etc. — if they wish.

It is important that agencies keep in mind the adage used by accreditation representatives of all flavors: "If it isn't in writing, it doesn't exist!" Of course, it is impossible to completely anticipate all possible permutations of potential problems that can occur during the adoption process, so phrases such as "including, but not limited to..." are imperative.

It is also important to say it more than once, and in several documents. All documents should be signed by the client(s) and returned to the agency for placement in the client's file, to demonstrate that the client was advised — in several ways.

Principal vs. agent

In a "social services" transaction where the goal is to work together toward a relationship of trust and confidence, ignorance on the part of any one participant can place the entire enterprise at jeopardy. The better informed the clients, the more likely their decisions will be based upon realistic expectations and therefore more correct and appropriate for their needs, as well as the child's needs.

However, in today's adoptions, and particularly international ones, the agency and parents are not the only participants involved. Regardless of their respective awareness, we come to the next hurdle: When is one of the participants in the adoption process someone for whom you are responsible — like it or not?

The legal concept of principle vs. agent is also sometimes known as an employer/employee relationship. Depending on the legal definition of your working relationship, if you, the employer or the principle, use an employee or agent to accomplish your goal, then as the principle, you may be vicariously liable for any cause and/or effect of the agent's action.

For example:

- Do you use contract social workers to perform home-studies?
- Do you use overseas coordinators to identify children for placement?
- Do you refer prospective parents to specific medical doctors or other social service professionals for an assessment of the adoptive child's health or social conditions?
- Do you hire an outside translator for foreign language documents, or is it done by one of your staff members?
- Do you network with other agencies to place children?

Conduct within the scope of employment

Within the adoption community today, there is much confusion about what differentiates an "independent contractor" from an "agent"; as the principle, an agency may be liable for an agent's actions; independent contractors, by definition, are "independent." Whether or not one particular person is, or is not, an employee of another is the subject of various legal tests known to most lawyers and/or human resources personnel. Get competent advice if there is any doubt.

For example:

- Do you execute interagency contract agreements which clearly define the roles and scope of authority of each participating agency?
- Is it clear to clients that the agency is not "recommending" one particular independent services provider, such as a specific medical doctor or translator?

This is important because recently some attorneys have advanced a legal theory of negligent referral, when an agency recommends one specific outside consultant. The failure to clearly delineate relationships

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between an agency and a translator or medical doctor could be interpreted as an affirmative failure to act by adoption agency representatives, and thus either intentionally or negligently cause the client(s) to be "misled" by bad "advice" from a professional whom the client believes is an agent for the adoption agency.

Agencies should develop contracts for an independent contractor's work-related performance that clearly define the boundaries of their services. If an individual or entity's conduct is not within the "scope of employment," then there is no vicarious liability for such conduct.

Make sure the clients clearly understand the non-employer relationships to other third-parties performing services — are the services on behalf of the agency or on behalf of the client? If the services are actually on behalf of the client, perhaps a separate agreement between the client and other third-party service provider is appropriate. (Remember informed consent?) This could also be an "assumption of risk" that could be allocated by agreement between the various contracting parties to the option.

Third-Party Intervenors

Unique to international adoption service providers, however, is a distinct characterization of one type of independent contractor that cannot be avoided. This legal concept, generally, is known as a "Third-Party Intervenor."

At some point in the process, there will be a person or legal entity over whom none of the parties involved in the agreement (for certain, discreet services) will have any control whatsoever. And the completion of the adoption will not happen without the participation and collaboration of that Third-Party.

These types of third-party intervenors are also commonly referred to as "wild cards" or "kickers." The common vernacular within international adoption circles includes, but is not limited to, "that INS official" or "that foreign government official." Third-Party Intervenors should be clearly mentioned, defined, explained, and accounted for in the adoption services agreement, in the event of their non-cooperation, which may well be "within the scope of *their* employment."

Good practice policies

Just as a contract defines the boundaries of an agreed-to exchange between two or more parties, policies and procedures define the why's and how-to's of implementation of the agreed-to services being provided. Thinking through and establishing good, solid, routine procedures from clear policies will do wonders.

One benefit of good policy is that roles are clear, boundaries defined, responsibilities delegated, and there is a cognizable chain-of-command for the decision-making process. That is, there is at least a minimum standard of service which all employees recognize the clients should receive. As a result, the agency staff will develop a "corporate culture" based upon the service standards adhered to and expected of them.

"An agency should not perform adoption-related services before the clients have agreed and consented to the terms of the service about to be performed...timing is everything."

Customer service

While the various State jurisdictions vary in their legal requirements, an affirmative attempt by an agency to meet the most restrictive requirement of any of the agency's working locations — as a minimal standard — may prevent a potential lawsuit. Aside from that, however, the agency can be assured that the services being offered meet the legal community's reasonable expectations. To meet those expectations, an agency should:

- Establish milestone events which must be met during the process in order to move to the next level of the process.
- Regularly log — in writing — telephone conferences with both clients and third-party, independent contractors, and confirm the details of the agreed-to process — in writing.
- Keep copies of all documents and paperwork.
- Have the clients sign receipts indicating they received the appropriate training materials, child referral or placement information, and third-party referral options (do not make those choices for them).

Remember: "If it isn't in writing, it doesn't exist."

Serving the agency mission

Just as agencies are not guarantors of a child's health, emotional, mental, or psychological well-being, they are not the guarantors of those entities in the adoption circle over which they have no control; know what those boundaries are.

With new, statutorily-required "disclosure" and "duty-to-investigate" standards being instituted, what is "reasonable" is still on shifting sand. For this reason, "good practice" standards are imperative to maintaining the agency's mission — you cannot place orphaned and abandoned children in loving homes if you are out of business.

Conduct a "legal audit," similar to a financial one, on a regular basis. Some basic questions might be:

- Have you, by failing to get clear agreements between all involved parties to the adoption process made yourself, in legal effect, a *de facto* principal to some other entity's actions and assumed the liability for their conduct?
- Have you made reasonable attempts to accurately ascertain and transmit all the current, material, and relevant non-identifying medical and social "facts" concerning the child offered for placement? (Be sure you are not providing conclusions, unless you are a trained, licensed, and bonded medical professional.)
- Have your clients agreed in advance (without dangling a child placement) to your services with informed consent and appropriate counsel, from third-party, trained professionals of their individual, independent choice, so they may formulate their own, appropriate conclusions unique to their personal circumstances and situation, by weighing the various risks and assuming the consequences of their considered decision — that is, have they knowingly Assumed the Risk?

Just remember, all the legal mumbo-jumbo in the world cannot overcome sloppy or shoddy work. Having solid policies and procedures, i.e., minimum standards, is what protects you from the most dangerous of all legal components: The Facts. Those darn facts are just really difficult to avoid — they are what they are, and once done, you cannot change them!

Carl A. Jenkins is Associate Director and General Counsel of World Child, Inc., 1400 Spring St., Suite 410, Silver Spring, MD 20910; 301-588-3000. *This article is not intended to offer specific legal advice; consult your own legal representatives.*

JOSEPH FERENC, et al., Plaintiffs, v. WORLD CHILD, INC., et al., Defendants.

Civil Action No. 95-2199

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

977 F. Supp. 56; 1997 U.S. Dist. LEXIS 14457

September 19, 1997, Filed

DISPOSITION: [**1] Motions of defendants World Child, Inc., Adams, Goolsby and Geer and of co-defendant The Frank Foundation for summary judgment granted and complaint dismissed with prejudice; complaint dismissed without prejudice as to defendants Tatiana Kamneva and Galina Smirnova pursuant to Fed. R. Civ. P. 4(m); final judgment entered for defendants World Child, Inc., Sherrell Goolsby, Barbara Geer, Veronica Adams and The Frank Foundation Child Assistance International, and against plaintiffs Joseph Ferenc and Julie Ferenc, with costs.

CORE TERMS: intentionally, healthy, orphanage, deficit, strabismus, consulted, outrageous conduct, anticipated, exculpatory, obliged, induced, negligent misrepresentation, emotional distress, summary judgment, misrepresentations, misrepresented, negligently, peculiarities, coordinator, hypothesis, presently, concealed, ambiguous, adoptive, arranged, severely, unserved, disorder, arrival, queried

COUNSEL: For JOSEPH FERENC, JULIE FERENC, plaintiffs: Leslie Scherr, SEYMOUR & SCHERR, PLLC, Washington, DC.

For WORLD CHILD, INC., SHERRELL GOOLSBY, BARBARA GEER, VERONICA ADAMS, defendants: Jeffrey Jerome Hines, ECCLESTON & WOLF, Washington, DC.

For THE FRANK FOUNDATION CHILD ASSISTANCE INTERNATIONAL, defendant: Richard Bart Nettler, Pamela M. Deese, ROBINS, KAPLAN, MILLER & CIRESI, L.L.P., Washington, DC.

JUDGES: Thomas Penfield Jackson, U.S. District Judge.

OPINIONBY: Thomas Penfield Jackson

OPINION: [*57] MEMORANDUM AND ORDER

In early November, 1994, plaintiffs Joseph and Julie Ferenc, a New Jersey couple, adopted a three-year-old Russian boy, Alexander Kiriuskatski, in [**2] Tver, Russia, and brought the child to the United States. Over [*58] the ensuing months it became apparent that Alexander suffers from one or more serious and irreversible congenital neurological and visual disorders. In consequence, the Ferencs brought this action in November, 1995, for "wrongful adoption" against, inter alia, defendants World Child, Inc. ("WCI"), a District of Columbia adoption agency through which Alexander's adoption was arranged, and three of its employees who participated in making the arrangements. n1

n1 Also named as co-defendants are The Frank Foundation Child Assistance International, Inc., a non-profit corporation that assisted WCI in identifying Alexander as available for adoption, and two Russian nationals who have never been served with process and are not presently before the Court.

Plaintiffs allege that by misrepresenting Alexander to them as essentially healthy, defendants caused them to adopt (and thus to assume parental responsibility for) a child whom they would not have adopted [**3] had they been fully informed of his true physical and mental condition. According to plaintiffs, defendants either knew of Alexander's deficits and intentionally concealed them from plaintiffs, or knew little or nothing about them and negligently concealed their ignorance. Plaintiffs also charge defendants with intentionally causing them emotional distress.

The case is presently before the Court on the motion of defendants WCI and its employees for summary judgment, the necessary discovery having been substantially completed. The co-defendant The Frank Foundation has belatedly joined in the motion immediately prior to oral argument.

I.

The record before the Court establishes that in the spring of 1994 the Ferencs, having previously adopted a Guatemalan boy without complications, decided once again to try a foreign adoption. They became aware of WCI through a news article and inquired of its executive director of the prospects for adopting a Russian child. Told that, in general, the health of Russian adoptees was "very good," the Ferencs entered into a written contract with WCI for its services in early August, which the parties later supplemented in writing in September, 1994, after [**4]

WCI had engaged the assistance of co-defendant The Frank Foundation to locate a Russian child available for adoption. (Def. Ex. 1-4.) Both Ferencs signed the contract documents, initialing them on each page, on August 5th and September 28th, respectively.

Also in September, 1994, WCI informed the Ferencs that two Russian children had been identified as available for placement n2 and sent them photographs and a three-page English translation of an abstract of Alexander's medical history, dated July 21, 1994, prepared by the Russian physician (an unserved co-defendant) in charge of the orphanage in Tver. Among other matters the abstract disclosed that Alexander had been born prematurely on June 11, 1991, as the third child of a poor, single mother who died in January, 1994. At birth he weighed 4.73 pounds and currently weighed just under 25 pounds. His head circumference was given as 45.5 cm. or 18.2 inches. He was said to have "convergent strabismus" and flat feet. A neuro-psychiatric entry noted "delay of mental development," and that phrase was repeated as the "diagnosis," attributable (in the doctor's opinion) to "social neglect in the family."

n2 The Ferencs adopted the second child as well, a girl, at the same time they adopted Alexander. Her health is presumably unremarkable and her adoption not in issue in this case.

[**5]

When queried by the Ferencs, WCI officials assured them that the conditions reported appeared to be neither unusual in adoptive children from Russia in their experience, nor uncorrectable. On their own initiative, the Ferencs consulted a general practitioner of their acquaintance in New Jersey to whom they showed both the photo of Alexander and the medical abstract. He refused to offer any opinion on the child's condition and suggested that they ask for further information. WCI informed the Ferencs that it had access to no information about Alexander other than as had been supplied by the orphanage.

Notwithstanding the absence of further particulars, the Ferencs nevertheless traveled to Russia at the end of October, 1994, [*59] intending to continue with the adoption process. They were met on arrival in Moscow by a "coordinator" (presumably arranged for by WCI or The Frank Foundation, although paid directly by the Ferencs) who took them to the orphanage at Tver. There the Ferencs observed Alexander in person and spoke with the chief physician who had prepared the abstract. She told them that Alexander's strabismus was surgically correctable, and that the peculiarities they perceived in [**6] his posture and gait were due to "nutritional deficiencies." She was aware, she said, of no other medical problems. The Ferencs were reminded of their right to decline to go forward with the adoption if they chose to do so.

Again the Ferencs elected to proceed, and they returned from Tver to Moscow that night with Alexander enroute to the United States. Prior to departure, and as they understood to be required by U.S. immigration authorities, they had Alexander examined by Russian physicians at a Moscow clinic who pronounced him "generally healthy." While awaiting their flight home in Moscow, they were also told by the coordinator, whose source of information is not given, that Alexander's mother had died of "intoxication."

Since his arrival in the United States, Alexander has been diagnosed as microcephalic, and afflicted with an attention deficit/hyperactivity disorder. He also exhibits what may be fetal alcohol syndrome, and his strabismus has been determined to be inoperable.

II.

The sole basis asserted for this Court's subject matter jurisdiction of this case is diversity of citizenship. *28 U.S.C. § 1332.* Thus the Court is obliged to apply the law of the District of Columbia [**7] in deciding the case. *Erie R.R. v. Tompkins, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938).* It does not appear that the District of Columbia has yet formally recognized a tort of "wrongful adoption," but on analogy to the tort of "wrongful birth," which the District has recognized, see *Haymon v. Wilkerson, 535 A.2d 880 (D.C. 1987),* and precedents from other jurisdictions, n3 the Court will anticipate the District's recognition of a tort of "wrongful adoption" and assume that plaintiffs' claims are actionable under District of Columbia law.

n3 See *Mohr v. Commonwealth, 421 Mass. 147, 653 N.E.2d 1104 (1995); Mallette v. Children's Friend and Service, 661 A.2d 67 (R.I. 1995); Gibbs v. Ernst, 538 Pa. 193, 647 A.2d 882 (1994); Roe v. Catholic Charities of the Diocese, 225 Ill. App. 3d 519, 588 N.E.2d 354, 167 Ill. Dec. 713 (App. Ct. 1992).*

Counts I and II, respectively, allege that defendants intentionally or negligently misrepresented the state of Alexander's health to the Ferencs, assuring [**8] them that he was essentially a healthy child whose deficits, if any, were minimal, transient, and/or amenable to correction with medical treatment routinely available in the United States. Count III charges that defendants intentionally caused plaintiffs to suffer extreme emotional distress.

To make out a prima facie case of intentional misrepresentation, plaintiffs must prove that defendants (1) made a false representation, (2) regarding a material fact, (3) with knowledge that the representation was false, (4) with intent to deceive, and (5) which induced action in reliance on the representation. See *Bennett v. Kiggins, 377 A.2d 57, 59 (D.C. 1977),* cert. denied, *434 U.S. 1034, 54 L. Ed. 2d 782, 98 S. Ct. 768 (1978).* Similarly, the elements of negligent misrepresentation are (1) negligent communication of false information, (2) which the

defendants anticipated or should have anticipated was likely to induce action or inaction by the plaintiff, (3) and on which the plaintiff did reasonably rely. See *Kirkland & Ellis v. Ruiz-Mateos, 923 F. Supp. 255, 262 (D.D.C. 1996)* (citing *Hall v. Ford, 445 A.2d 610, 612 (D.C. 1982)).*

To prevail on their claim of intentional [**9] infliction of emotional distress, the Ferencs must prove that defendants engaged in (1) extreme and outrageous conduct, (2) that intentionally or recklessly caused them to experience (3) severe emotional distress. See *Waldon v. Covington, 415 A.2d 1070, 1076,* (D.C. 1980).

The parties' dispute centers on whether defendants misrepresented any facts, intentionally [*60] or otherwise; whether plaintiffs relied on any such misrepresentations; whether WCI or The Frank Foundation is liable for any misrepresentations made by non-moving defendants; and, finally, whether plaintiffs are divested of any or all of the claims they now assert by the terms of their contract with WCI. n4

> n4 Defendants bear the burden of demonstrating that, upon undisputed material facts, they are entitled to judgment as a matter of law. *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); Anderson v. Liberty Lobby, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1985).* All reasonable inferences must be drawn in plaintiffs' favor. See *Tao v. Freeh, 307 U.S. App. D.C. 185, 27 F.3d 635, 638 (D.C. Cir. 1994).*

[**10]

Count III, charging defendants with intentional infliction of emotional distress, is the most easily dispatched. The record contains absolutely no evidence from which a jury could find (nor any reason to expect that such evidence will be forthcoming) that any defendants who are now before the Court intended that the Ferencs experience any emotion other than the joy that should attend the adoption of a healthy son. No motive, ulterior or otherwise, is shown for these defendants to have deliberately deceived the plaintiffs as to Alexander's health, and no conduct is ascribed to them that in any respect resembles the "extreme or outrageous conduct" that has been held necessary to prove the tort under District of Columbia law. See *Waldon v. Covington, 415 A.2d 1070, 1076-78 (D.C. 1980);* Restatement (2d), Torts § 46.

As is the case with Count III, the allegations of intentional fraud in Count I as well are vulnerable to summary disposition on the evidentiary record. Count I presumes proof that defendants were fully informed of Alexander's multiple deficits and consciously elected to conceal the truth from plaintiffs. The WCI defendants profess to have received no medical information [**11] about Alexander other than that which they immediately imparted in its entirety to the Ferencs, and there is no evidence to the contrary. Even were the Court willing to impute to WCI and The Frank Foundation all knowledge in the possession of all co-defendants, including the unserved Russian co-defendants, the hypothesis that they or any of them knew Alexander to be more severely impaired than they made known to the Ferencs remains no more than a hypothesis on this record. For the Court to allow a jury to find otherwise would be to countenance an exercise in xenophobic speculation.

Count II, alleging negligent misrepresentation, is the most promising of plaintiff's several theories of liability. The record could support a finding that the WCI and The Frank Foundation defendants were ignorant of Alexander's true condition and made no reasonable efforts to ascertain it, while allowing plaintiffs to believe that their optimistic assurances were predicated on knowledge they did not have. The cases cited by plaintiffs from other jurisdictions hold that there is a common law duty imposed upon adoption agencies to investigate the background of prospective adoptees with reasonable care and [**12] to fully inform their client adoptive parents of the results. n5

> n5 See cases cited at fn. 3. Plaintiffs also cite various District of Columbia regulations to essentially the same effect.

The duty originates, however, in the contractual relationship between the parents and the agency, and its scope may, by agreement of the parties, be varied by the terms of the contract. See *Howard Univ. v. Best, 484 A.2d 958, 966-67 (D.C. 1984).*

In the instant case the contract between the Ferencs and WCI is expressed in writings that clearly diminish WCI's investigatory responsibility to an absolute minimum. It purports, in fact, to absolve WCI and The Frank Foundation of any duty at all, by expressly waiving at its inception "any and all claims" that might arise in favor of plaintiffs from the relationship. Moreover, the several documents comprising the contract are elsewhere rife with cautionary language respecting the "risk" of foreign adoptions, including the fact that WCI and The Frank Foundation would furnish [**13] "medical and social information" when it was "available," but that they could not guarantee its completeness [*61] or accuracy. By the contract the Ferencs acknowledged that their child could possibly arrive "with undiagnosed physical, emotional and/or developmental problems." With respect to Russian children in particular, the September 28th supplement contains nearly two pages of text advising of "ambiguous clinical diagnoses" by Russian physicians and the "problematic state" of Russian medical education and proficiency. At several places it states that the prospective adoptive parents are not obliged to accept a child who they believe is not healthy. (Def. Ex. 4, "Memo of Understanding," pp. 2-3.)

Whether the exculpatory effect of the waiver clause would indeed reach "any and all claims" of any description (such as those of Counts I and III) is unnecessary to decide. The waiver clause clearly served notice to plaintiffs that WCI and The Frank Foundation did not warrant the success of their efforts, and did not expect to be liable, in whatever respect they might fail or the reasons for its failure, for a less than wholly satisfactory adoption.

Exculpatory contract provisions are valid [**14] and enforceable in the District of Columbia. See *Maiatico v. Hot Shoppes, Inc., 109 U.S. App. D.C. 310, 287 F.2d 349, 350 (D.C. Cir. 1961); Potomac Plaza Terraces, Inc. v. QSC Products, Inc., 868 F. Supp. 346, 353-54 (D.D.C. 1994).* Plaintiffs have presented no contrary authority n6 nor offered reason why the waiver clause should not, in the circumstances, be given the effect it was obviously intended to have and to which plaintiffs, by their conduct as well as their signatures, signified their assent.

> n6 *Kraft v. Lowe, 77 A.2d 554 (D.C. 1950)* is inapposite. No inaccurate representations are alleged to have induced the Ferencs to enter into the contract in the first place. The representations of which they complain all occurred after they had agreed upon the terms upon which services would be furnished by WCI and The Frank Foundation, but before they had committed finally to the adoption.

Plaintiffs argue that the contract is ambiguous; they were, they say, unaware of its import as relieving WCI or [**15] The Frank Foundation of any liability for the expense, not to mention the anguish, of raising a severely handicapped child. Yet at virtually every stage of the process, the Ferencs sought reassurance from independent sources that their forebodings were unfounded. They consulted an American physician in New Jersey. They personally observed Alexander, queried the Russian physician in charge of the orphanage at Tver about peculiarities they noticed in his appearance, and consulted still other doctors in Moscow immediately prior to their return to the United States. Their actions in that regard are consistent only with an understanding on their part that they alone bore the risk of Alexander's true condition.

For the foregoing reasons it is, this 19th day of September, 1997,

ORDERED, that the motions of defendants World Child, Inc., Adams, Goolsby, and Geer and of the co-defendant The Frank Foundation for summary judgment are granted, and the complaint is dismissed with prejudice as to said defendants; and it is

FURTHER ORDERED, that the complaint is dismissed without prejudice as to defendants Tatiana Kamneva and Galina Smirnova pursuant to Fed. R. Civ. P. 4(m); and it is

FURTHER [**16] ORDERED, that the Clerk enter final judgment for defendants World Child, Inc., Sherrell Goolsby, Barbara Geer, Veronica Adams, and The Frank Foundation Child Assistance International, and against plaintiffs Joseph Ferenc and Julie Ferenc, with costs.

Thomas Penfield Jackson

U.S. District Judge

the information presented below is not intended as legal advice, you should consult your own, individual attorney for specific information relevant to you.

Joint Council
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Adoption Risk & Liability Concerns

1. Staff Training & Education - best practices; specific to individual placing country risks
2. Written Contracts & Memos of Understanding - clients acknowledge receipt of information
3. Adequate Insurance Policies - more than one kind of coverage
4. Competent Legal Advice - knowledge of adoption, contract and litigation issues

Staff Training:

?? Routinely scheduled group training sessions including group staffing review of recent case problems.

?? Role-play and practice of intake questions; how to offer a referral to a family; third-party representations of doctors or orphanage staff assessments; developing approved, "stock answers" to FAQ's.

?? Prepare individual, written *checklists* for critical functions, for a basic, consistent, minimum-service level standard.

Written Documentation:

?? Signed contracts, memos of understanding, assumption of risk acknowledgment, service/payment invoices, receipt of educational material, application questionnaire, medical & social history extracts, travel orientation review, etc.

?? Make sure your documentation conforms to, (*and that you are aware of*), all local, State, federal and foreign regulations, statues, laws and legal doctrines, *i.e.*, waiver or estoppel policies, assumption of risk principles, charitable immunity doctrines, public policy exceptions, contract and statute of fraud limitations, and the like!

?? Schedule an annual legal audit of your documents, just as you would finances or social work practices.

Adequate Insurance Policies:

?? *Different types of coverage*: (a) general liability; (b) specific "social work" addendum(s); (c) D & O or E & O (*malpractice*) coverage; (d) group/agency coverage vs. individual social worker coverage; (e) loss of business coverage; (f) automobile/travel/medical coverage; (g) umbrella – "overage" policy.

?? Know the limitations of your insurance policies: if you are sued, the insurance company will issue a "*reservation of rights*"; you may not have control of any settlement negotiations; the insurance company may dictate which attorney can represent your agency; you may have to hire your own, individual "attorney coverage counsel" to deal on behalf of your agency with your own insurance company.

Competent Legal Advice:

?? Prepare a *coordinated legal strategy* in conjunction with your adoption "best practices" procedures, documentation and insurance coverage BEFORE you become involved in an adversarial relationship.

?? Because international adoption overlaps among several disciplines, your legal counsel should be familiar with, (*at a minimum*), adoption law – both foreign and domestic; contract law; local State laws and legal doctrines; litigation process and procedures and insurance settlement strategies.

?? If sued, know that you may need some or all of the following different representations: (a) legal liability defense counsel; (b) overage, or "excess liability" defense counsel; (c) individual, personal defense counsel; (d) insurance coverage legal counsel; (e) corporate and/or individual asset defense (bankruptcy) legal counsel; and possibly, (f) third-party indemnification legal counsel.

Competing legal interests flow-chart: